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1321 No. 3902 1321

In the United States

Circuit Court of Appeals

For the Ninth Circuit

October Term, 1923

DAVID TAYLOR,
Apellant,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES CO., et al
Appellees.

Brief for Appellees other than W. J. Loring

H. R. COOKE
and
(COOKE, FRENCH & STODDARD, on Brief.)
Attorneys for all appellees except W. J. Loring.

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No. 3902

In the United States

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For the Ninth Circuit

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vs.

NEVADA HUMBOLDT TUNGSTEN MINES CO., et al
Appellees.

Brief for Appellees other than W. J. Loring

STATEMENT OF FACTS

In plaintiff's complaint (Rec. 1113) it is alleged inter alia:

> "That thereupon the defendants Poole, Murrish, Nenzel and Friedman acting for themselves and for the defendants Lena J. Friedman, Jones, Hinch, Goodin, Twigg and Hunt-

> ington with the intent to deceive plaintiff, and for the purpose of inducing plaintiff to execute and undertake the supplemental contract (Ex. "C") hereafter referred to falsely and fraudulently **by means of telegrams and letters** informed the plaintiff that further and new development work had been carried on within said mines, mining claims and mining rights of Nevada Humboldt Tungsten Mines Co. which had developed and placed in sight, blocked out and made ready for mining, large quantities of scheelite ore of commercial value and capable of being concentrated and the concentrate so returned being of great value."

It is then alleged (Rec. 1131) that on or about April 2, 1919, Poole, Murrish and Nenzel came to Denver, Colorado for the purpose of inducing plaintiff to make a supplemental contract and that plaintiff believed and relied upon their representations; that they were acting for themselves and for their associates and that said Poole, Murrish and Nenzel (Rec. 1132)—

> "For the purpose of inducing the plaintiff to enter in and upon said supplemental contract (Ex. "C") of date April 2, 1919, then and there falsely and fraudulently and with the intent to deceive the plaintiff **represented to the plaintiff** that since the examination of the mines, mining claims and mining rights of the Nevada Humboldt Tungsten Mines Co. and the report thereof made by Howland Bancroft, mining engineer aforesaid, to this plaintiff, great and additional ore bodies of great and equal quality had been developed; that a large amount of new development work had been done and performed upon said mines and that

there was then, on said second day of April, **blocked out, in sight and ready for mining and reduction into concentrates, over 60,000 tons of scheelite ore which would carry an average of 1.75% Tungstic acid**; that each and all of the representations aforesaid were false and untrue and were known by said defendants at the time they were made to be false and untrue and were made for the purpose of deceiving the plaintiff and for the purpose of causing him to undertake and carry out the terms of said supplemental contract of April 2 (Ex. "C" attached hereto); that in truth and in fact at said time there was opened up, blocked out and in sight in said mine, not to exceed 19,000 tons of scheelite ore of an average value not to exceed 1.75% Tungstic acid. That plaintiff then and at all times thereafter relying upon and believing said false and fraudulent representations of said defendants so made as aforesaid, executed Exhibit "C" etc."

The defendants (Rec. 1229-1236) in their answer squarely and unqualifiedly deny all of the foregoing. The issue of fraud so tendered by plaintiff **is the crux of his case.** It is so admitted by plaintiff (Op. Br., p. 20) and was so considered by Trial Court (Rec. 1423). The duty on plaintiff of establishing fraud was imperative because upon no other possible theory could he maintain his suit, for it is conclusively shown by both pleadings and proof that plaintiff did not perform or offer to perform his contract (Ex. "C") **according to its terms** but only conditionally and with heavy abatement claimed by him on account of the alleged fraud.

PLAINTIFF'S ALLEGATION OF FALSE REPRESENTATIONS "BY MEANS OF TELEGRAMS AND LETTERS" IS ABSOLUTELY UNSUPPORTED BY A SINGLE LETTER OR TELEGRAM.

The decree of the Trial Court (Rec. 1437) adjudicates that no false or fraudulent representations whatsoever were made by any of the defendants to plaintiff. In its opinion (Rec. 1428) the Trial Court after an exhaustive and unusually analytical review of the evidence says:

> "In view of this correspondence and Bancroft's second report, it is impossible to find that the **letters and telegrams** in evidence from defendants to Taylor prior to April 2, 1919, contained fraudulent misstatements, or that by anything in such letters and telegrams, Taylor was misled."

Taylor made a prior contract on this same property with the defendants (Rec. 1127) on January 16, 1919. Shortly thereafter (Rec. 1129) he had Howland Bancroft, his expert mining engineer, examine and report on the property for him. The examination took Bancroft about a week's time. During February and March some letters and telegrams were exchanged between plaintiff and defendant Nenzel. In letter Nenzel to Taylor Feb. 14, 1919, (Rec. 781) Nenzel says, "Conditions at the mine are exceptionally bright". On February 24, Nenzel wired plaintiff (Rec. 783) giving foot-

ages and assays and Trial Court in its opinion found (Rec. 1425) that tested by plaintiff's expert Bancroft's assays, Nenzel's statements were substantially correct and in some instances Bancroft's assays ran even higher than Nenzel's estimates. But in any event Taylor could not have been misled or deceived by Nenzel's wires or letters at any time prior to February 24, 1919 because on February 24 (Rec. 779) Taylor writes Nenzel that "The best thing to do all around would be to close down" and then **he suggests that defendants sell him their stock at reduced price.** If at that time Taylor had been deceived into believing mine was developing so well, why ask defendant to reduce its selling price? On March 10th (Rec. 789) Nenzel writes Taylor that they "have encountered some very rich ore". The Trial Court in its opinion found, (Rec. 1426) that tested by the assays of Bancroft, plaintiff's expert, Nenzel's said statement "was literally true"—that (Rec. 1428) there was twice as much commercial ore blocked out in May as in the latter part of January. There was also a wire from Friedman to Taylor on March 25th, but it will be found that this wire (Rec. 796) stating that the mine development looked good and Nenzel's wire to Taylor March 12 "Mine never looked so good", were proven to be true by Bancroft's assays. The twenty-four feet all in good ore, mentioned by Nenzel, and the sixty feet, men-

tioned by Friedman, were between the third and fourth levels and Bancroft reports (Rec. 1428) an average in that space of 2.51% which admittedly was good ore.

Appellant's third attempted assignment of error (Op. Br. p. 18) attacking the foregoing is clearly without merit.

NO FALSE STATEMENTS OR REPRESENTATIONS OF ANY KIND WERE IN FACT MADE TO TAYLOR AT THE DENVER MEETING ABOUT APRIL 1, 1919, RELATIVE TO 60,000 TONS OR ANY DEFINITE TONNAGE, OR 1.75% VALUE OR ANY DEFINITE VALUE.

PLAINTIFF'S VERSION

Taylor says (Rec. 51) Murrish and Nenzel were present when Poole gave plaintiff the alleged false data as to tonnage; that they could not help hearing the figures given by Poole who gave (Rec. 47) the tonnages and assay values, widths of ore and that Poole stated (Rec. 56) there was over 60,000 tons of ore developed which would average over 1.75%.

On Cross Ex. Taylor says (Rec. 101) he had had charge of mines and had gone into (Rec. 103) and looked at a good many mines; that Bancroft told him (Rec. 106) in January 1919 the defendant's mine had great possibilities of being a very valuable mine; that he intended at very start to have

Bancroft examine the mine; this was understood. Bancroft made a report about February 7, 1919. Taylor read (Rec. 107) this report and knew what Bancroft said as to ore in sight and that Bancroft had reported (Rec. 111) 8100 tons ore in sight. Taylor admits (Rec. 113) defendants never suggested he should not visit or examine the mine, but on the contrary the fact is (Rec. 113-796) they suggested on March 25 that he do so. At the April first meeting Murrish (Rec. 155-156-165) demurred to going into new contract. Taylor says (Rec. 154) after talk with Poole it never entered his mind that there was less than 60,000 tons there, and that he (Rec. 155) couldn't tell (Rec. 155) whether he (Taylor) ever used 60,000 ton figures as basis for any of his calculations; that he never (Rec. 155) represented after the talk with Poole there was 25,000 or 35,000 tons surely there—"am (Rec. 158) very sure I never so used those figures". Defendants' Ex. "B" is then shown (Rec. 159) Taylor and he admits the calculations of ore tonnages of **35,400** tons and **25,500** tons made thereon on April 1, 1919 are in his own handwriting. He still insists, however, that he implicitly believed Poole's statement as to there being 60,000 tons. Later he admits (Rec. 162) discussing those figures, 25,000 and 35,000 tons, with Murrish, Nenzel and Poole at Denver. On April 17 (Rec. 361 also 839-834) Taylor writes Crucible Steel Company stating there is

an assured minimum of **43,000** tons—no mention of 60,000 tons which he claims Poole represented and which representation he says he believed. He admits (Rec. 383) preparation about May 2 or 3, 1919 of a prospectus he intended to use in interesting capital to float project in which prospectus (Rec. 384) it is stated that on April 1 (the very date he claims Poole said there was 60,000 tons) the work **indicated** an ore reserve of **41,000** tons.

With such gross contradictions occurring in his own story on the very crux of the case, we say Taylor is left without any credibility before the Court.

DEFENDANT'S VERSION

Poole says (Rec. 466) that Nenzel and Murrish were present all the time throughout the interview on March 31 at Denver. That he (Poole) gave Taylor no figures whatsoever as to tonnages, widths of ore, or assay values and never (Rec. 470-471) told Taylor that there was 60,000 tons or any definite number of tons of ore blocked out, or that the value of the ore was 1.75% or any definite value. (See also Rec. 475-478). That at that time (Rec. 480) Taylor discussed subject of amount of ore being 35,000 tons and also calculated on basis of there being 25,000 tons in the mine. That at no time did he (Poole) (Rec. 496) represent 60,000 tons blocked out or any definite quantity of ore

whatever. That (Rec. 498) he gave Taylor some figures showing percentages, which figures Taylor put upon a photostat but that he told Taylor those figures were merely estimates which had been placed on a map in possession of Poole by John Huntington who had in turn gotten his information from Morrin, defendant's mine superintendent. (See Poole's testimony further Rec. 510-512-545-552-571-572-575-576-580-581).

Nenzel says (Rec. 601) he made no representation to Taylor at the Denver meeting of any 60,000 or other tonnage or 1.75% value or other value of the ores. That (Rec. 601-603-604) Poole never made any such representations to Taylor in presence of witness (See further Rec. 608-610-613-614-615-616-617-627).

Murrish says (Rec.630) he made no representations whatever to Taylor at the Denver meeting about there being 60,000 tons, or any tonnage in the mine carrying an average of 1.75% value or any value; also that Poole did not (Rec. 631-633) make any representations or statements to that effect to Taylor at that time or at any time in the presence of the witness (See further Rec. 468-469).

Goodin says (Rec. 661-662) that he did not on or about June 1919 as testified to by Taylor, or on any occasion, state to Taylor that there were 60,000 tons of ore in the mine or any number of tons of ore whatever. That neither Nenzel, Poole or Mur-

rish (Rec. 663) made any statement to Taylor in presence of witness in regard to the tonnage of ore in the mine or the value thereof.

Hence we say that plaintiff's allegation and testimony as to Poole, Nenzel or Murrish having **represented to him** at the Denver meeting that there were 60,000 tons of ore averaging over 1.75% have been shown to be untrue because—

(1) Every allegation and statement by plaintiff relative thereto is flatly anl unqualifiedly denied both generally and specifically in the pleadings, as well as in the evidence by Nenzel, Murrish and Poole.

(2) Plaintiff's claim of misrepresentation is refuted by every physical fact in the case;

(a) The utter improbability of Poole, Nenzel and Murrish being foolish or credulous enough to attempt such a crude and clumsy imposition;

(b) Plaintiff having ample time before putting up a dollar to detect and expose the shabby falsehood and hence no possible inducement for said defendants to attempt misrepresentation;

(c) Defendants were not to get a dollar and plaintiff not obligated to put up a dollar except on mere chance that plaintiff would elect to exercise his option before June 16, 1919;

(d) Defendants invited (Rec. 113-796) plaintiff to come to Lovelock and examine mine, but at in-

stance of Plaintiff, instead, Poole, Murrish and Nenzel went to Denver;

(e) Evidence as a whole shows plaintiff and not defendants as the one who wanted and insisted upon modification of Exhibit "B", January option for 50c per share, and wanted and insisted on Exhibit "C", and that Murrish particularly signed only after plaintiff had become almost violent in his demands that the contract, Exhibit "C" be signed by defendants;

(f) The terms of Exhibit "B" were more favorable to defendants than those of Exhibit "C" were, and more onerous as to plaintiff and hence it is utterly unreasonable to believe that defendants would falsify or misrepresent in order to give plaintiff a more favorable contract than he already had;

(g) If plaintiff is correct in this case as to defendants representations of "over 1.75%" value, how account for his allegation sworn to by him (Rec. 957) in his complaint, Case No. 2263, a separate action at law for damages for same alleged fraud, that Poole, Murrish and Nenzel represented (Rec. 941) the value "from 1.50% Tungstic acid to 1.75% Tungstic acid";

(h) Poole expected employment with Taylor (Rec. 595-219-246) in event deal went through, so it would be suicidal for him to commence with Taylor by fraud and falsehood when he must have

realized his fraud would soon be exposed;

(i) While plaintiff testifies he had no very extended knowledge of mines and mining, there is no evidence that defendants knew this to be so when at the Denver meeting, but all the evidence is to effect they had a right to believe plaintiff was experienced, hence the improbability of their making the alleged representations;

(j) Taylor refutes his claim of fraud as to Poole by thereafter, and after having made the alleged discovery of the fraud, trying to arrange at San Francisco meeting in June for Poole to have charge (Rec. 426) of all Taylor's mining operations;

(k) Poole, a mining engineer, Murrish a lawyer, both men of standing and education, would be extremely unlikely to hazard their future standing by becoming parties to a miserable fraud and one which, had they attempted it, they must have known would certainly miscarry;

(l) The fact is that Poole, Nenzel and Murrish were practically unknown to plaintiff—no possible reason to believe the incredible, i.e. that he would place such childlike and perfect confidence in their statements, particularly when they were opposite to him, their interest opposed and he knew they were dealing with him at arm's length;

(m) Taylor would not even commence to proceed under his January option, Exhibit "B", with-

out examination by Bancroft, his own expert. Then why should we believe he would be any more willing to do so under the April second Exhibit "C" option?

(3) Plaintiff's claim of fraud or misrepresentation is completely refuted by his own evidence, acts and conduct in that:

(a) Notwithstanding the grave charge he now attempts to make against Poole, he was entirely willing in June 1919 (Rec. 426) to have Poole as his superintendent, holding a high and responsible position of trust and for which position Poole was totally unfit if Taylor's charge of fraud be true;

(b) The evidence as a whole clearly shows Taylor fully expected on and before April 2 to have the aid of Bancroft to make a second examination of the mine, and evidence (Rec. 223-224) clearly shows that Taylor didn't intend to put up, and did not put up, any money until after he had determined with Thane about May 2 to have Bancroft make such an examination;

(c) Defendant's Exhibit "B" (Rec. 899) prospectus, drawn at Denver meeting by Taylor, refers to **25,500** tons and **35,400** tons **ore in mine.** Plaintiff's Exhibit No. 32, (Rec. 839) letter to Crucible Steel Co. on April 17th, refers to **43,000 tons of 1.4% value,** part of which is developed on three sides and part on two sides and expresses belief that 200,000 tons may be developed, and plaintiff's

Exhibit No. 33 (Rec. 843) letter to McKenna, the same as above. These all show plaintiff absolutely mistaken in his claim of 60,000 tons representation or "over 1.75%" value, particularly as he said he had implicit confidence in Poole's alleged statement and hence he could not have hesitated in reporting Poole's figures to parties he hoped to interest. He says (Rec.) he repeated Poole's figures to his father and Brown, but why orally to these two only, and why, when discussing tonnage in writing, did he never mention the Poole figures?

(d) Exhibit "U" (Rec. 923) prospectus prepared by Taylor and Thane on train about April 27, has statement "April 1st survey indicated 41,000 tons". "41,000 tons of fully developed ore on April 1, 1919." If on April 1st Poole said 60,000 tons and if as plaintiff says he believed this implicitely why did plaintiff say only 41,000 tons on April 27, when it was manifestly to his interest to make promotion look as attractive as possible?

(e) Taylor could not have relied implicitely or otherwise upon the alleged or any representations of Poole or he would not have come all the way from Denver west to the mine, gone through it etc. April 26 and had from thirty to one hundred panningss made for him and visited and examined the entire mine as he did do and then turn East again to New York;

(f) Taylor told Poole (Rec. 377) in New York about May 20, 1919, he would not advance $20,000 on concentrates as security unless he first had report by Bancroft. Hence it is highly improbable he would advance $150,000.00 or nearly eight times the $20,000. without like assurance. True plaintiff denies making this statement, but he also stated he did not recall whether he made it or not. On May 20, Taylor wires Bancroft (Rec. 910) he is unwilling to incur expense of Jackson coming out from New York until he has Bancroft's report showing at least 40,000 tons and if so much isn't there to wire, so Jackson can be headed off;

(g) Taylor's demand for modification of option, Exhibit "C" isn't based on his alleged discovery of any misrepresentations because on May 23 and before he makes any claim to having discovered any fraud, he and Thane (plaintiff's Exhibit 22) (Rec. 828) plan to see Poole and obtain a modification of the option as to amount as well as time of payment and Thane wired Poole (plaintiff's Exhibit No. 25) (Rec. 830) accordingly;

(h) If Taylor had been deceived by defendants as he claims and when on May 30 he had assay returns on Bancroft's sampling, he would undoubtedly have complained of the misrepresentations, but instead he wires Thane (Exhibit "L") (Rec. 911) that he will endeavor to extend option six months, institute friendly bankruptsy proceedings,

work property under agreement with Court and pay creditors when Bancroft is able to report at least 40,000 tons, developed on at least two sides;

(i) So neither would Taylor, had he been the victim of fraud, found it necessary to tell Loring in New York City, June 25th (Rec. 1414) that he was going to take the mine away from the defendants, or to tell Poole (which plaintiff never denied) at Lovelock on May 27th (Rec. 1413) that he wanted Goodin to go to City as a creditor so as to "put the screws" to defendants and thereby force them to accept a modification of contract;

(j) On May 30, 1919 after Taylor had Bancroft report, and after Taylor must have known all about alleged imposition, if it existed at all, he wires Thane, Exhibit "L" (Rec. 911) about "general prospects for big cheap mine excellent", and suggests that Poole, the very man Taylor now claims he was deceived by, be brought into scheme of urging on plan of Taylor getting possession of property by "friendly bankrupt proceedings and myself appointed Receiver, make Poole Superintendent". If Taylor had been the victim of false and fraudulent representations by Poole, as Taylor now claims, it is inconceivable that he either would or could have entertained a thought of bringing Poole into close and responsible relations with him, as indicated by his telegram to Thane, Exhibit "L".

The trial Judge who had the great advantage of

seeing the witnesses, observing their demeanor on the stand, said: (Rec. 1435).

> "The evidence is not sufficient to show that the alleged false representations as to tonnage in the mine were made".

In its decree (Rec. 1437) the Court found as a fact:

> "That the defendants did not, nor did any or either of them, either acting for themselves or for any other person or persons, or otherwise make to the plaintiff at any time false and fraudulent, or false or fraudulent representations whatsoever."
>
> "That it is not true that the plaintiff was induced to enter into the contract of April 2nd, 1919, a copy of which is attached to plaintiff's complaint, marked Exhibit "C", or to perform its conditions, or any or either of them, by reason of any false and fraudulent or false or fraudulent representation or representations whatsoever."

The rule is that when as in this case, the allegations of fraud are denied by the answer—

> "these denials must be overcome by the satisfactory testimony of two witnesses, or of one witness, corroborated by circumstances which are equivalent in weight to another."
>
> Vigel v. Hopp, 104 U. S. 441; 26 L. Ed., 765.
>
> To same effect:
>
> Southern Dev. Co. v. Silva, 125 U. S. 45; 31 L. Ed. 678-680.
>
> Monroe Cattle Co. v. Becker, 147 U. S. 47; 37 L. Ed., 72-76.
>
> Satterfield v. Malone (C. C.) 35 F., 445-447.

Walcott v. Watson (C. C.) 53 F., 429-432.
Campbell v. Northwest Eckington Co., 229 U. S., 561; 57 L. Ed. 1330-1335.
Demarest v. Winchester Repeating Arms Co. (D. C.) 257 F., 162-170.

There is no corroboration of Taylor's story, unless it is in the alleged admission made at the June meeting in San Francisco when Jackson, Taylor's lawyer, had concocted a scheme (Rec. 429) to in some way trap Poole, Murrish and Nenzel into an admission of fraud. Jackson testified (Rec. 424) that he stated at the meeting that "Mr. Poole had represented to Mr. Taylor that the mine contained 60,000 tons of commercial ore; it now developed that that representation was a **mistake,**" and while making a lengthy statement at this meeting, which embraced the matter quoted, Jackson says (Rec. 428) he would from time to time ask, "is that correct," and that Poole acquiesced by nodding his head. Poole denied (Dec. 510-511-512) that he asquiesced—Nenzel denies it (Dec. 610-611-612)—Murrish denies it (Rec. 633 to 636). Jackson admitted (Rec. 747) that Murrish denied he had ever assented.

But the point is—that Jackson's evidence if accepted as absolutely true, merely shows that the 60,000 representation **was a mistake,** and that a charge of mistake, even if acquiesced in, is not an admission of **fraud** and that a charge of fraud cannot be sustained by proof of **mistake.**

Mercier v. Lewis, 39 Cal., 532-535.
Connell v. El Paso etc., Mfg. Co. (Colo.) 78 P., 677-679.
Dudley v. Scranton, 57 N. Y., 428.

Hence, against contention that Taylor's story is to be believed, there is, therefore, no corroboration thereof.

BUT EVEN IF REPRESENTATIONS WERE MADE AS CLAIMED IN COMPLAINT AND DETAILED IN TAYLOR'S EVIDENCE THEY WERE NOT REPRESENTATIONS OF FACT BUT MERE EXPRESSIONS OF OPINION AND TAYLOR AS AN ORDINARILY PRUDENT BUSINESS MAN MUST HAVE SO ACCEPTED AND UNDERSTOOD THEM.

Taylor admits (Rec. 146) he didn't expect Poole could look into ground any better than he could. He admits that he understood he was merely getting Poole's **opinion** as to how many tons (Rec. 148) would probably be there. "That was all I expected to get from him on that point." He says that Poole stated the ore was "blocked out" or "in sight"; he knew it had not been mined, broken down etc. He knew moreover it had not been blocked out, i. e. opened on four sides because on April 17 he writes (Exhibit No. 32, Rec. 839) to Crucible Steel Co. there were 43,000 tons 1.4% part of which is "developed on three sides and part on two sides." He knew therefore that whether 60,000 tons were talked or not, the tonnage was and could in nature of thing be merely opinion matter only.

Further Taylor's prospectus Exhibit "U" (Rec. 924) prepared by him on train April 27 stating that April 1st survey "indicated 41,000 tons" all show he knew 60,000 ton talk by Poole, conceding for the moment it was ever made at all, was mere guess, mere opinion, as to what amount of ore might have been within any given area, for how otherwise account for his said statement that on April 1st (the very date when he claims Poole made the 60,000 ton representation) there were **41,000 tons,** and that only **"indicated."**

Poole says (Rec. 498) that he told Taylor that the figures of percentage of ore values furnished by him to Taylor and which Taylor put upon the photostat, "were merely estimates" which had been placed on that map by John Huntington who was the mining engineer who had brought this map up to date, and that Mr. Huntington had gotten that information from Mr. Morrin, who was superintendent, and Mr. Morrin had arrived at those values by panning in the mine; that (Rec. 546) he told Taylor that he hadn't had occasion to visit the mine; that he had sent Mr. Huntington out there and Huntington had brought the map up to date and he and Morrin had put certain estimates and values on there; that (Rec. 547) he told Taylor he should not rely on these because while Huntington was an accurate surveyor, as to those percentages, he (Taylor) must realize they were merely estimates; that (Rec. 549) on

Tuesday, the last day of the Denver conference, the only discussion as to tonnage was a discussion with reference to **hypothetical** tonnages that were in that prospectus Exhibit "B."

Taylor's conduct in figuring Exhibit "B" prospectus at Denver at 25,500 tons and also 35,400 tons probable or possible ores and this too on the very same day he claims Poole stated to him there were 60,000 tons, ought to be conclusive evidence that, conceding for the moment Poole ever made such statement, Taylor accepted it as a mere estimate or opinion, for otherwise Taylor would have used the 60,000 ton figure in his prospectus instead of the 25,500 or 35,400 ton figure he did use. So in writing Crucible Steel Co. on April 17, there were 43,000 tons developed, part on three sides and part on two sides, and in preparing his prospectus Exhibit "U" on train April 27 stating that April 1st survey "indicated 41,000 tons," all show that he had no definite tonnage in mind because at one time he takes 25,500 tons, at another 35,400 tons, at another 43,000 tons and at another 41,000 tons as basis of calculation of ore tonnage. Had Poole in fact made positive representation of 60,000 tons, Taylor would unquestionably have used that larger tonnage figure for his promotion purposes. He naturally wanted to make it as attractive as possible, but the evidence shows he never did use the 60,000 tonnage figure that he claims Poole gave him.

> "The quantity of ore "in sight" in a mine, as that term is understood among miners, is at best a **mere matter of opinion.** It cannot be calculated with mathematical or even approximate certainty. The opinion of expert miners, on a question of this kind, might reasonably differ quite materially." (Bold face ours.)
>
> Southern Dev. Co. v. Silva, 125 U. S., 247; 31 L. Ed. 679-681.

Just so. There is not a scintilla of evidence showing defendants' pannings and tests were not honest and taken at the points indicated. That Bancroft in some instances obtained different results proves nothing as some of his tests ran higher, while others ran lower than defendants' tests. So also Bancroft's own evidence and map will show assay values of four and five per cent at one point, and in the immediate vicinity the values will drop off to nothing. Bancroft made his report which at best was his **opinion** of ore in sight and no more should Poole's statement, even if made as claimed by Taylor, be construed by Taylor or anybody as anything more than a mere expression of his **opinion.**

The representation that a certain quantity of ore is "in sight" is a mere matter of opinion.

> Tuck v. Downing, 76 Ill., 71-94. 7 Morr. Mg. Rep. 83-104.
>
> Nounnan v. Sutter etc. Co. (Cal.) 22 P., 515-516.

The allegation that there were 60,000 tons of ore

"blocked out" can mean nothing, except that the ore body was opened on four sides, or three sides, or two sides, as the case may be, and the exact number of tons of ore in such block must necessarily be conjectural, speculative and mere opinion. So with the allegation that there were 60,000 tons of ore "in sight." To be literally "in sight" it must be broken down and sufficiently tested to determine that it is ore and not waste or part waste. So even taking plaintiff's allegations and testimony at face value there is no representation of a fact, but a mere expression of opinion. The courts have had occasion to pass upon this precise question and it has been uniformly held that representations as to ore "blocked out" or ore "in sight" are mere expressions of opinion and not a statement of fact.

Southern Dev. Co. v. Silva, 125 U. S. 247, 31 L. Ed., 678.

Strattons Independence v. Dines, 126 F., 968-970.

Tuck v. Downing, 76 Ill. 71-94.

Richardson v. Lowe (C. C. A.) 149 F., 625-634.

Representation "that there were from 25,000 to 30,000 cubic yards of ore in sight was but an expression of opinion and party to whom same was made must have known this."

Eldridge v. Young America etc. Mining Co. (Wash.) 67 P. 703-707.

The statement—

"that there was enough silver ore on the dump at the mines to pay the par value of the stock" was mere matter of opinion.

Crocker v. Manley (Ill.), 56 A. S. R., 196-197.

Finally and convincingly disposing of this feature, we submit Taylor's testimony on cross-ex.

"Q. You didn't understand that he (Poole) could see into the ground any better than you could, did you?

A. No.

x-x

Q. You supposed then, did you not, that you were merely getting his opinion, based upon such development as there existed, as to how many tons would probably be there?

A. Yes.

Q. **And that was all you did expect from Mr. Poole on that point, wasn't it?**

A. Yes.

(Rec. 146-147-148)

BUT EVEN IF THE ALLEGED REPRESENTATIONS WERE MADE, AND IF THEY WERE NOT MERE EXPRESSIONS OF OPINION, BUT WERE STATEMENTS OF FACT UPON WHICH PLAINTIFF MIGHT RELY AS SUCH, THE EVIDENCE SHOWS PLAINTIFF DID NOT RELY ON THEM, BUT RELIED THROUGHOUT ON HIS OWN EXAMINATION AND ON BANCROFT'S EXAMINATION AND REPORT.

Taylor says (Rec. 60-61) he went to mine just to be able to say he had seen it as an operating proposition—reached mine April 24th or 25th, 1919—ar-

ranged about middle of May for Bancroft to further examine mine—was at mine (Rec. 76) May 31. He admits (Rec. 153) that on April 2 he may have considered a further examination of mine before putting up money—that afterwards he contemplated further examination of mine because various people insisted on it—that he had (Rec. 154) implicit confidence in Poole's statement. He then says that he never after his talk with Poole (Rec. 155) represented to anybody there was 25,000 or 35,000 tons surely in mine—that (Rec. 158) he is very sure he never so used those figures. Defendants' Exhibit "B" was then shown (Rec. 159) to him, and he admitted the calculations there, on basis of 35,400 tons and 25,500 tons, **were in his own handwriting.** He still insists, however, that he implicitly believed Poole's statement as to there being 60,000 tons. Later he admits (Rec. 162) of discussing these figures of 25,000 and 35,000 tons with Murrish, Nenzel and Poole; also (Rec. 163) that it was on basis of 35,400 tons at Eight Dollars or 25,500 tons at Ten Dollars he intended to present proposition to get it financed; that he had planned (Rec. 166) while Denver meeting was on to visit the mine before going to New York to float proposition. He went (Rec. 170) into mine and to (Rec. 171) the bottom and all through the workings—spent (Rec. 172) about three hours —had other business (Rec. 173) in New York be-

sides going on this April 2nd option contract. That when he got to New York (Rec. 176) Thane agreed to go in for $25,000, but he insisted that mine must be examined by Bancroft again; that Taylor agreed about May 12 (Rec. 178) on Bancroft making second examination and that he would pay for it; that examination was to be made for Taylor and a report made to him. He says he was satisfied regarding tonnage, etc. before he went East but after Bancroft came into it then he wasn't and wanted to see his report; that **no money** (Rec. 179) had **actually been paid until Taylor returned from Denver and after he had changed his mind and concluded he must have Bancroft's report.** He received (Rec. 184) Bancroft's report on May 28th. He admits (Rec. 213) wiring Bancroft (Exhibit "G") that he wanted Bancroft to report 40,000 tons 1.4%. In defendants' Exhibit "K" (letter Taylor to Bancroft) Taylor refers (Rec. 216) to "check up our ideas that there is at least 40,000 tons of ore assured." He first reached (Rec. 223-224) conclusion to have mine examined about beginning of May—it was May 9th—**prior to this we had discussed having another expert make an examination**—can not tell when (Rec. 225) he made up his mind to put $95,000 into deal—but that was (Rec. 226) same time when he had also concluded not to advance any money until reports in and everything satisfactory. On April 3, 1919 (Rec.

272) Taylor wired Bancroft and Trial Court said (Rec. 275) this telegram tended to show Taylor was relying on Bancroft as his expert. On May 14, 1919 he had (Rec. 283) not determined to advance any specific amount of money on the deal—up to May 20, 1919 (Rec. 286) he had not succeeded in getting one dollar in New York. Thane's insistance on a report (by Bancroft) was (Rec. 226-289-290) a few days before May 1st. After Taylor wired (Rec. 306) Bancroft to examine and report he says he would not go in if his report was unfavorable; that his father's $25,000 check was not sent to New York until after Bancroft's report of May 22nd of 40,000 tonnage; that he would not (Rec. 316) put his father's money in on 40,000 tonnage when his father originally understood 60,000 tonnage, except with his father's consent. He says he finally (Rec. 317) concluded to go through with deal on basis of 40,000 tonnage. Taylor insisted in June, 1919 (Rec. 318) on being named general manager of the company proposed to be formed to work the properties.

Poole says (Rec. 489) that at the Denver meeting he told Taylor the data on map used would not enable any one to calculate ore tonnage but simply tonnage and that tonnage was not necessarily ore; that Taylor said "that doesn't make any difference, what I want is to get sufficient data to present to Mr. Bancroft to show him that there has been

enough additional **development work** done there since his last visit to warrant him going again and I want to use that to urge him as I have been urging him, to go and he doesn't want to go; and I want to use this to urge Mr. Bancroft to go there again" to the mine and examine it again. He says that when Taylor was at the mine in May, 1919 (Rec. 508-509) various samples and pannings were taken and Taylor said "he wasn't interested in any panning and was going to abide by Mr. Bancroft's report." That at the Denver meeting on April 2nd (Rec. 513) speaking of Morrin and his estimates of value etc., Taylor said that he didn't place any great reliance on Mr. Morrin because Mr. Bancroft had so reported that Mr. Morrin was not reliable and he didn't like him. That (Rec. 514) Taylor then said that "he was going to absolutely rely on Mr. Bancroft; that while he didn't like him as a man he certainly admired him as a technician." That (Rec. 515) Taylor said "Mr. Bancroft was either in San Francisco or would shortly be in San Francisco and he expected he would come out right away and that Mr. Taylor expected to come with him," for the mine examination. That Taylor said he expected to have Mr. Bancroft at the mine in company with himself to make this investigation and he expected to come to the mine immediately because Mr. Bancroft could only come in the very near future; that (Rec. 526) Taylor said he wanted to get from me the data

of development work because "he wanted to give it to Mr. Bancroft to induce Mr. Bancroft to make an examination; he told us previously he was trying to get Mr. Bancroft to do it and he would not do it." Taylor visited the mine about the middle of April, 1919 (Rec. 518) and stated the reason Bancroft was not with him was that Bancroft had gone on some other examination; that Taylor went all through the mine. Taylor said (Rec. 519) he came down to see the mine. He saw all of it—all of our underground main workings—he measured up quite a few of the workings—he panned some himself and Morrin and myself panned a great deal for him.

Nenzel says (Rec. 626) in the Denver conversation he heard Taylor and Poole talking about Bancroft making an examination.

The evidence shows:

(a) That Taylor expected to have Bancroft, even before he had fully arranged for the Denver conference;

(b) The evidence of Poole and Nenzel shows Taylor wanted such data as was given in order that he might satisfy Bancroft that sufficient new development work had been done to justify Bancroft making a further examination and report on the mine;

(c) At least as early as about May 9th and before Taylor had expended as much as $250, railroad fare etc. to Lovelock and back to New York, he had

definitely determined to have Bancroft make examination and report and from thence on the matter hinged entirely on results of Bancroft's report as Taylor tells us he would not have gone on with the deal if Bancroft's report was unfavorable;

(d) Taylor had actually expended but a mere trifling sum (Rec. 341 et seq) in starting for New York preparatory to carrying out April 2nd option, when he and Thane on train decided on having Bancroft examine the mine before proceeding further. Besides Taylor himself tells us his trip East was on other business besides business of this option;

(e) Taylor did not rely on any alleged representations because he took the precaution to make a trip to the property himself in the latter part of April and spent four hours or more examining same and had from thirty to one hundred pannings made for him;

(f) Had Taylor relied on the alleged representations, then how explain his refusal to advance $20,000 on concentrates without Bancroft's report first had, and how explain his wire to Bancroft that he wanted a result of 40,000 tons in mine before being willing to incur comparatively trifling outlay for Jackson coming out from New York?

(g) Had Taylor relied on the alleged representations he would not have taken 25,500 or 35,400 tons as basis in Denver prospectus and he would not

have written Crucible Steel Co. and McKenna on April 17 there was 43,000 tons developed partially on three sides and part on two sides, and he would not in the prospectus (Exhibit "U" Rec. 923) prepared about May 1st on train have used the language "April 1st survey indicates 41,000 tons." The April 1st survey he refers to is undoubtedly the data given by Poole on that day at Denver. He would not in said prospectus have stated "41,000 tons of fully developed ore on April 1st, 1919." He would not have stated therein "that on April 1st, 1919, the net value of "ore in sight" taken at price stated, was 41,000 tons;

(h) Taylor says that he told Poole he wanted deal to be on "banking basis." If Taylor had gone to New York and stated that all he knew about the property was what the vendors, practical strangers, had told him, it could hardly be said to be on a "banking basis," hence we must conclude that before going on with the deal, Taylor intended to have the report of Bancroft who everybody in the case concedes was a man of exceptional high standing in his profession.

As early as April 27, when Taylor and Thane were on the train going to New York it was definitely decided to have Bancroft make an investigation. This examination was subsequently made. In such case a party cannot complain of any misrepresentation.

Southern Dev. Co. v. Silva, 125 U. S. 247; 31 Law. Ed. 678.

"There must be the assertion of a fact on which the person entering into the transaction relied and in the absence of which it is reasonable to infer that he would not have entered into it at all or at least not upon the same terms."

Moore v. Carrick (Colo.) 140 P., 485-488.

"It is not enough that it may have remotely or indirectly contributed to the transaction or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place."

Kerr on Fraud & Mistake, 72; see also page 408. See also,

Wheeler v. Dunn (Colo.) 22 P. 827.

Grymes v. Sanders, 93 U. S. 55, 23 Law. Ed., 798.

"If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses he cannot say he relied on the vendor's representations." ions."

Farrar v. Churchill, 135 U. S., 609; 34 L. Ed. 246. See also,

Murray v. Paquin, (C. C.) 173 F., 319-328-329.

Eldridge v. Young America etc. Mining Co. (Wash.) 67 P., 703-706-707.

Munkres v. McCaskill (Kan.) 68 P., 42, 43, 44, 45.

Farnsworth v. Duffner, 142 U. S. 43; 35 L. Ed. 931-934.

"When the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor."

Schapperio v. Goldberg, 192 U. S. 232; 48 L. Ed. 419-425.

"They (the cases) all with one accord impose upon a party who is given opportunity to investigate, and undertakes to do so, the responsibility for the result, unless he protects himself by a warranty" et seq.

Smith & Benham v. Curran et al. (C. C.) 138 F., 150-158.

"If the purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him, or his agents, he cannot be heard to say that he has been deceived by the vendor's misrepresentations" et seq.

Tuck v. Downing, 76 Ill. 71.

Defendant in case infra, had made alleged false representations relative to timber land in Canada. Plaintiff sent his own son to investigate the timber. The court said that while defendant's representations opened up a horizon for speculation, they did not induce the investment by plaintiff and that in such cases, the plaintiff must be deemed to have entered upon the venture by reason of the investigation made by himself or on his behalf and will not be heard to say that he relied upon the representations of the vendor.

Moant v. Loizeau (N. J.) 92 Atl. 593-594-595.

So, when defendant had represented respecting a gold mine in New Mexico that vein was from six to fifty feet wide and two hundred feet deep, that the ore went sixty-eight ounces per ton from a car previously shipped, and plaintiff visited the mine and inspected the same before paying any money and took samples, it was held he could not assign fraudulent representations as a basis for relief.

Crocker v. Manley (Ill.) 45 N. E., 577, 580-588.

When representations had been made by agents of vendor who took an option to purchase certain coal lands in Missouri that there was at least a given and definite quantity of coal on the land and pending expiration of the option, the optionees had the ground examined by their own expert, and later the property was purchased and proved valueless, the court held in an exhaustive opinion that the means of knowledge having been open to the optionees before they were called upon to exercise their option. and nothing was done to prevent optionees obtaining full information at the time of making such examination, the court held that the optionee would not be heard to say that he had been deceived by the misrepresentations of the vendor.

Morgan etc. Coal Co. v. Haldaman (Mo.) 163 S. W., 828-842-843.

> "It is almost universally held x-x that if investigation is made by the party, he cannot claim that he relied on the representations of the seller, except in cases of active fraud or concealment, or in cases where fiduciary relations existed, or peculiar knowledge on the part of seller was shown."
>
> Moore v. Carrick (Colo.) 140 P., 485-489 and cases cited.

In case infra Copper mining claims in Arizona were involved. The defendants Harmons and one Britt owned some of the claims and had options on the others. Britt held a power of attorney from Harmons authorizing him to act. Britt went to New York City and represented to plaintiff that in one of the groups there were already "blocked out" from 70,000 to 100,000 tons of copper ore ready for treatment and reduction by smelting which would yield not less than 6% copper; that the ore body had an average width of from 12 to 25 feet and that it was developed not less than 400 feet in depth; that on another group there was a large ore body from which 30 to 35 tons of 15% copper ore could be taken daily for six months. The plaintiff thereupon sent two mining experts to examine the property. This was after plaintiff had signified its intention to take the property, but before title passed. The reports of the experts seem not to have been put into the case. The plaintiff testified he relied entirely on defendant's representations, which representations

the court found as a fact were false. But the court held that having undertaken an independent investigation, plaintiff cannot be heard to say he relied on the representations of defendant, and relief was denied.

A very important case:

Mitchell Mining Co. v. Harmons (Ariz.) 100 P. 795-796.

BUT IF REPRESENTATIONS WERE MADE AS ALLEGED, AND IF THEY WERE REPRESENTATIONS OF FACT AND NOT MERE EXPRESSIONS OF OPINION, AND IF PLAINTIFF ACTUALLY RELIED UPON THEM AND NOT ON ANY INDEPENDENT INVESTIGATION, PLAINTIFF HAS NEITHER PERFORMED NOR OFFERED PERFORMANCE WHICH COURT CAN USE AS EQUITABLE BASIS FOR DECREE OF SPECIFIC PERFORMANCE.

Taylor's contract of April 2, 1919, Exhibit "B" (Rec. 1400) provided Taylor was to raise sufficient money on or before June 16, 1919 to liquidate indebtedness of the three corporations, estimated at $220,000.00; that a deposit of the required amount in the Wells Fargo Nevada National Bank, San Francisco, should be sufficient evidence of his performance to entitle him to the 62% of the stock; "That this agreement shall expire by limitation on June 16, 1919 x-x-x and be of no further force or effect if

the first party (Taylor) shall not have negotiated the loan and secured the money, x-x-x. Time is of the essence of this agreement."

Taylor alleges (Rec. 1142-1143) that on or about June 1, 1919 he offered performance provided defendants would allow plaintiff an "abatement" on account of the alleged false representations, and that he offered to advance under the terms of his contract $85,000.00—$10,000.00 of which was to be set aside as working capital and $75,000.00 distributed ratably among creditors of the three corporations, and when 20,000 tons additional ore were blocked out, he would pay the balance due the creditors of said three corporations. The offer of performnace by Taylor is shown by contract proposed by Taylor at San Francisco with Exhibit "A-1" Addenda, requiring assent of 95% of creditors before it should take effect, and evidence shows that no creditor assented but that they all refused.

The answer of the defendants, Nevada Humobldt Tungsten Mines Co., et al (Rec. 1247-1248) unqualifiedly denied plaintiff's said allegation of performance.

PLAINTIFF'S EVIDENCE RE OFFER OF PERFORMANCE.

Taylor when testifying **admits (310) he never made an unconditional offer to perform**; that (Rec. 374-375) the proposition presented by him to de-

fendants at San Francisco about June 7, 1919, was the only offer of performance. Defendants' Exhibit "Z" (Rec. 933) is part of Taylor's "offer of performance" of his agreement of April 2, 1919 (which agreement provided he was absolutely to raise and loan the three corporations, to pay off creditors, a sum estimated at $220,000.00 on or before June 16, 1919.) Said Exhibit "Z" shows Taylor offered to raise but $75,000.00 to pay off creditors, and this only on condition that Taylor be given right to repay himself therefor from proceeds of ores worked "at such times **as Mr. Taylor may deem best,**" thus placing it within Taylor's absolute power to indefinitely defer settlement and hold off creditors. No wonder the creditors refused approval. Taylor's said "offer" was further conditioned that any further advances by him to pay creditors was determinable by new ores blocked out and that what should constitute "new ore" was exclusively for determination of his own engineer, Mr. Bancroft, **thereby putting it within Taylor's own power to say when he could be called on to advance further moneys for said creditors.** Taylor's said offer also provided that mill plant should be fully insured (Rec. 936) and in case of fire loss, insurance money should be applied to **payment of Taylor's bonds,** regardless of whether creditors were paid or not. Of course the creditors objected. Taylor's "offer" was also conditioned (Rec. 935) on its approval by at

least 95% of creditors whose claims exceeded $500.00. The record shows no creditors, large or small, would accept Taylor's "offer." Edson F. Adams, one of the creditors at the creditors' meeting in San Francisco June 7, 1919 says (Rec. 407-408) that he interrupted proceedings and opposed acceptance of Taylor's "offer" before its reading was completed.

Taylor's contract, Exhibit "B," provides that he was to receive 62% of the stock "in full payment for services rendered in securing such sum of money." Clearly this contemplates that Taylor was to borrow the money from third persons not that he himself was to make the loan or any part of it. Admittedly he did not get the money from third persons but he now attempts to show performance because he says that he would have been willing to advance the necessary funds, provided the result of an independent investigation by his engineer Bancroft had proved satisfactory to him. He undertook the business as broker, not as a lender of money. His evidence shows, accepting it at its face value, that he ceased to be a broker and became a money lender. His grievance, if any, is that he was fraudulently induced to make preparations to make a loan. Neither Taylor, nor anybody else found by him was ever ready, able, or willing unconditionally to make the loan, and Taylor's evidence at the best is that he would **probably have been ready, able and willing to**

perform had he not been deceived.

Taylor must have been at the point where he was actually ready, able and willing to perform **unconditionally**. This point was never reached by him.

Curtis v. Mott, 35 N. Y. S., 983.
Clarke v. East Lake Lumber Co., 73 S. E. 795.

As conclusive against Taylor that he was never ready or willing to perform except on condition of his independent examination through his engineer Bancroft being satisfactory to him we submit the following, excerpted from Taylor's cross ex:

"Q. So you were ready to advance your money and carry the deal through whether Mr. Thane came in or not, without any report from Mr. Bancroft?

A. Not after Mr. Bancroft had been engaged to make the report; naturally I wanted to see his results.

Q. From the moment you engaged Mr. Bancroft to make the report you were not ready to came in on this proposition without further investigation. Is that not true?

A. Naturally when I engage a man to make a report I want to see the result of his report.
(Rec. 178-179.)

Q. And on some day intermediate your trip on the train with Mr. Thane, to New York, and the 14th day of May, you reached the conclusion that you would employ Mr. Bancroft to have him make an examination in order to advise you whether or not there were sufficient ore reserves there to justify you in putting up a large amount of money?

A. Yes, sir.
(Rec. 228.)

See also the following:

> Q. So that all the services you claim to have performed and all the expenses that you went to in this matter subsequent to the 12th or 13th day of May **were after you had determined to have the representations which you say were made, verified by a report from Mr. Bancroft.**
>
> A. Yes, I am not sure whether it was the 12th or 13th day of May or not.
>
> Q. The first telegram to Mr. Bancroft appears to have been sent by you on May 14, 1919; on what day did you reach the conclusion to have an examination of the mine made. x-x-x ?
>
> A. On Mr. Thane's advice coming East on the train along about the beginning of May.
>
> THE COURT: Has he answered that question when he first determined to have the examination made by Mr. Bancroft, the first or middle of May?
>
> THE WITNESS: I meant to say the first of May.
>
> Q. You meant to say the first of May?
>
> A. In the beginning of May when I came East with Mr. Thane."
>
> (Rec. 223-224.)

PLAINTIFF'S CASE STANDS WHOLLY UPON HIS OWN TESTIMONY AND HE IS IMPEACHED AND DISCREDITED BEFORE THE COURT.

1st. Taylor says (Rec. 150) that on April 2, 1919 Poole falsely and fraudulently represented there was over 60,000 tons of 1.75% ore blocked out and in sight in mine and that he discovered falsity of

Poole's said statement when Bancroft reported only 20,000 tons, which was about May 28, 1919. But notwithstanding this discovery of Poole's fraud and falsity, Taylor on May 30, 1919 wants Poole's aid in getting Taylor a better bargain on property and for Poole to be **Taylor's superintendent** in charge of mine operations. (Exhibit "L" Rec. 1412).

2nd. Taylor also accuses Friedman of fraud and falsity committed on or before April 2, 1919 and claims discovery of such fraud on May 28, 1919. But at San Francisco meeting about June 7, 1919 and with full knowledge, Taylor proposes to have Friedman, as well as Poole, **made directors** of Taylor's proposed new company for working the property.

3rd. Taylor thought he could deal with Friedman, Murrish et al better in San Francisco than in Lovelock and he told Poole to conceal vital information from his said associates, but to see Goodin, the Lovelock banker, and have him come to San Francisco "and if these fellows (referring to Friedman, Murrish, Nenzel et al) get obstreperous, he can put the screws on them." (Rec. 1413-1414).

4th. About June 20, 1919, Taylor had a conversation with Loring in New York and stated that he (Taylor) was "going to take the mine away from the boys, or away from Friedman." (Rec. 1414).

5th. In his complaint and testimony (Rec. 150) Taylor says Poole falsely etc. represented 60,000 tons ore blocked out which would average **over** 1.75% Tungstic Acid. But in a separate action, at law, for damages against these defendants, Taylor says Poole's representation was 60,000 tons carrying "from 1.50% of Tungstic Acid to 1.75% of Tungstic Acid." (Rec. 1417-1418).

6th. Taylor alleges he was misled and deceived on April 2, 1919 by defendants' letters and telegrams as to big rich ore development, most of which were sent prior to February 24, 1919. But we find Taylor writing Nenzel on February 24, "The best thing to do all around would be to close down." On March 25 Taylor writes Friedman, "Regarding the exercise of the option it certainly looks pretty blue at present." (Rec. 1425-1427).

7th. Taylor testifies his father agreed to put up $25,000, and take preferred stock in a company. Then Taylor admits absolutely nothing was said to his father as to how many shares his father was to receive or as to the par value, or as to capitalization of such company. (Rec. 188 et seq.)

8th. Taylor says his father's agreement was to put up **$25,000** absolutely; that no other sum was ever mentioned (Rec. 195) by Taylor as to amount of his father's subscription. But in letter May 28 (Exhibit "P" Rec. 917) Taylor states his father's agreement is for **$20,000.** In wire to Thane on May

25, Taylor says his father has taken **$20,000** (Rec. 902). In prospectus (Exhibit "V") prepared by Taylor about May 1st he states F. M. Taylor (who was his father) was taking **$20,000** of stock (Rec. 929). On cress-ex. as to how account for the discrepancy Taylor says, "I could not tell you at this time. I don't remember." (Rec. 385).

9th. Taylor says (Rec. 197-198) he knows that his father's subscription was not $20,000 as stated by him in Thane wire of May 25 (Rec. 196) but that it was $25,000 because of later advices he had received from Nenzel that total Tungsten debts was $155,000 instead of $150,000 as previously estimated, thus making it necessary for him to get $25,000 instead of $20,000 from his father. He denies (Rec. 198) that the Nenzel advice of additional $5,000 indebtedness came **after** he had wired Thane on May 25. But the evidence (Exhibit "T" Rec. 992) shows Taylor mistaken in so stating and that the Nenzel advices could not have influenced Taylor on May 25 as he did not receive same until May 26th.

10th. Taylor testifies (Rec. 198-199) that on May 25, 1919 he sent a certain important wire (Exhibit "D") to Thane; that it was sent because of his having received a wire from Thane that Thane's $25,000 would not be available until he (Thane) returned to San Francisco. The Thane wire (Exhibit "E") to that effect was shown Taylor on cross ex.

(Rec. 199) and he stated that it was the Thane wire he referred to as influencing him in sending his said wire of May 25th. But the Thane wire (Exhibit "E") is dated **May 29th** and when Taylor was asked (Rec. 201) how he could be influenced on **May 25th** by a wire of **May 29th** he says "It could not have sir, I must have been mistaken. x-x-x."

11th. Taylor alleges and testifies he expended over $8,000.00 in reliance upon the alleged representations. On cross-ex. (Rec. 341) he is unable to specify a single dollar of expense incurred by him before he talked with Thane in latter part of April 1919 when Thane insisted on independent examination of mine by Bancroft. Taylor can not say whether one dollar or $250.00 (Rec. 344) was expended before he and Thane talked about arranging for the Bancroft examination.

12th. Taylor alleges and testifies that the $8,000.00 was expended by him in going to New York and while there in his endeavoring to perform the agreement of April 2, 1919. But on cross-ex. he shows (Rec. 347) large portion of the $8,000.00 was expended on account of two other contracts and also that (Rec. 173) he had other business taking him to New York.

13th. Taylor testifies that of the $8,000.00 alleged expenditures, $5,000 was attorney's fees to John G. Jackson and was incurred in reliance on

Poole's alleged statement re 60,000 tons ore in sight. But Jackson admits (Rec. 430) that the $5,000.00 fee agreement was concluded coincident with a definite arrangement on May 14, 1919 by Taylor to wire Bancroft to make independent examination of property.

14th. Taylor alleges and testifies that in reliance on Poole's statement re 60,000 tons ore in sight, he went into a deal whereby he actually expended $8,000 in an effort to raise about $150,000. But the evidence shows (Rec. 528) that on May 20, 1919 he thought so little of Poole's alleged statement that he would not even advance $20,000 when he was secured therefor, except upon an independent examination of mine by Bancroft which was determined on (Rec. 224) about May 9th.

15th. Taylor alleges and testifies that in reliance on Poole's alleged 60,000 tons in sight representation, he (Taylor) prepared to fulfill contract to raise $150,000.00, and then testifies that he sold bonds to raise part of the money. But these sales (Rec. 435-436) were **after** May 14, 1919 and **after** Taylor had determined upon an independent examination of the property by his engineer Bancroft.

16th. Taylor alleges and testifies he relied upon Poole's alleged statement of 60,000 tons ore in sight as a representation of a fact. But he admits on cross-ex. (Rec. 146) he did not expect Poole could see into the ground any further than he

himself could and the following ensued:

> "Q. You supposed then, did you not, that you were merely getting his **opinion,** based upon such development as then existed, as to how many tons would probably be there?
> A. Yes.
> Q. **And that was all you did expect to get from Mr. Poole on that point, wasn't it?**
> A. Yes."
> (Rec. 147-148).

17th. Taylor testifies (Rec. 155) that at no time at or after the alleged 60,000 ton representation on April 2nd by Poole, did he (Taylor) ever plan to represent to anybody that there were 25,000 to 35,000 tons surely in the mine. But he admits (Rec. 159) that Exhibit "B"(Rec. 899) is in his own handwriting and was made on April 2nd and was discussed (Rec. 162) with Poole. This Exhibit shows some elaborate calculations of prospective profits to investors on basis of **25,500** tons ore in mine, marketing $10.00 per ton and **35,400** tons, marketing $8.00 per ton.

18th. Taylor states (Rec. 154) that he had implicit confidence in Poole's statement that there was at least 60,000 tons ore and that thereafter (Rec. 155) he (Taylor) actually represented to parties he sought to interest, that there was 60,000 tons ore in mine. But Taylor never mentioned name of a single person (Rec. 157) to whom he so represented the property. Instead of representing the property at 60,000 tons ore in sight, which Taylor

would certainly have done if Poole had so stated and Taylor had "implicit confidence," the fact is that on April 17, 1919 Taylor writes (Exhibit No. 32 Rec. 839) to the Crucible Steel Co., "The result is now an assured minimum of **43,000 tons** of ore." On the same date he writes (Exhibit No. 33, Rec. 843) to Vanadium Alloy Steel Co., "The result is now an assured minimum of **43,000 tons** of ore, part of which is developed on three sides and part on two sides." In prospectus prepared by Taylor with Thane on train about April 27 he says, "On April 1st new survey of this work **indicated** ore reserve of **41,000 tons.**" On May 20th Taylor in wire to Bancroft (Exhibit "K", Rec. 910) mentions **40,000 tons** as amount to be assured. On May 14th in wire to Bancroft, Taylor mentions **40,000 tons.** In pencil prospectus (Exhibit "B", Rec. 897) made by Taylor at the very time he asserts Poole represented at least 60,000 tons, Taylor mentions **25,500** tons on basis of a ten dollar market and **35,400** on basis of an eight dollar market.

19th. Taylor states (Rec. 154) he had implicit confidence in Poole's statement that there was at least 60,000 tons ore "in sight" fully developed, "blocked out" etc. on April 2, 1919. But on cross-ex. (Rec. 380) Taylor is interrogated concerning a prospectus (Exhibit "U," Rec. 923) prepared largely, (Rec. 388) if not entirely by him about May 1st while he and Thane were on train on way to New

York; that ten or twelve copies of prospectus were made, shown to many people and this prospectus was used by Taylor (Rec. 381) as basis of raising money in New York. In this prospectus Taylor says, referring to mine development, "On **April 1st** new survey of this work **indicated** ore reserve of **41,000** tons." Taylor admits that while Thane wrote this statement into prospectus, (Rec. 392) that he (Taylor) furnished the data for said statement. The prospectus further states (Rec. 926) "41,000 tons of fully developed ore on April 1 1919"; also (Rec. 927) "that on April 1, 1919 the net value of ore **in sight** exceeds the sum of this loan and interest for two years (total about $170,-000) even under pre-war conditions." Taylor's "ore in sight" admittedly refers to the **41,000 tons** last above mentioned and it is absolutely certain the "April 1st survey" referred to ore estimates made by him at the Denver conference with Poole on April 1st and 2nd, because Taylor tells us (Rec. 392) the term "survey" used in said prospectus referred to a general resume of the proposition and not to any technical survey.

20th. On May 20, 1919 Taylor wrote a letter to Nenzel (Exhibit "C", Rec. 900). On cross-ex. regarding a statement in said letter, the followning occurred:

> "Q. Calling your attention to defendants' Exhibit "C" to the following phrase: " 'No-

body in the East wanted to tackle the proposition unless they had control, and we were unwilling to give that up.' " Do you recall making that statement?

A. I do not particularly recall it, but if it is in the letter, I made it.

Q. Was it true or false?

A. I don't know, sir."

(Rec. 181)

The trial court which had the advantage of the opportunity to witness the demeanor of Taylor while on the stand, must have become convinced that Taylor completely discredited and impeached himself by the manner in which he testified, the contradictions appearing in his testimony and the strong improbabilities of his story. This estimate of the trial court is convincingly shown throughout its written opinion. The court stresses (Rec. 1413) Taylor's proposal re "friendly bankrupt proceedings" with himself as "receiver"; Taylor's insistance (Rec. 1414) on having banker Goodin of Lovelock present at the San Francisco meeting so that "if these fellows (referring to Poole, Murrish, Nenzel and Friedman) get obstreperous he can put the screws to them"; also Taylor's statement to Loring (Rec. 1414) "I am going to take the mine away from the boys or away from Friedman x-x-x and looked me right in the eye when he said it"; also (Rec. 1432) referring to Taylor's statements of 40,000 tons being satisfactory:

"The question naturally arises, why did

> Taylor say that 40,000 tons were satisfactory, if he had been led to believe, and did believe, and would not have entered into the contract if he had not believed that there were actually 60,000 tons of commercial ore in sight in the mine? It was not until Attorney Jackson came to Lovelock, about May 29th, that any mention was made, or any use was attempted to be made, of the alleged fraudulent misrepresentations. There is no hint of it even in his telegram to Thane from Ogden, dated May 30th. (Exhibit "L," supra) Taylor's whole conduct indicates that he was satisfied in January as to the value of the property; that he determined then to secure it. From that time on his single purpose seems to have been to obtain it as cheaply as possible, and with the smallest possible outlay of money on his part.

Also that Taylor (Rec. 1433) in testifying regarding Poole's alleged false representations, admitted that he (Taylor) supposed he was merely getting Poole's opinion based on such developments as then existed; also (Rec. 1434) that Taylor wanted Poole (the very person who had, as he claims, fraudulently misled him into the agreement of August 2nd) to assist and co-operate in the "friendly Bankrupt prooceedings" with Taylor as "receiver" plan; also the trial court refers (Rec. 1434) to Taylor's statement, "Bancroft believes general prospects for a big cheap mine excellent," as an "illuminating statement"; also the highly significant fact, when we remember Taylor had repeatedly testified that he was misled and deceived,

is the statement of the trial court:

> "In my judgment Taylor was neither misled nor deceived by the defendants. He was following consistently an original plan to secure the property for the smallest possible outlay of money on his part." (Rec. 1435)

Also that Taylor repeatedly testified he was ready, able and willing to perform, and the trial court said, (Rec. 1436):

> "x-x and never prior to June 16th was he actually ready, able and willing to perform unconditionally."

THE RECORD DISCLOSES AND APPELLANT ADMITS THE EVIDENCE OF PLAINTIFF IS IN SHARP CONFLICT WITH THAT OF DEFENDANTS.

,The trial court in its opinion said: , ,

> Taylor's **whole case rests on the truth of his allegations** that false and fraudulent statements were made to him, and that he relied on them to his prejudice. The burden is on him to prove these allegations by a fair preponderence of the evidence. This in my judgment he has failed to do."
>
> (Rec. 1423).

Appellant's counsel fully recognize fact that the evidence is conflicting for they say, referring to the finding supra by the Court:

> "x-x the plaintiff now comes before this Court, **taking issue with the trial Court on these** questions of fact, and contending that

these facts were established and proven upon the trial by fair preponderence of the evidence."

(App. Op. Br. 20)

Again:

"There is, however, a **sharp conflict in the testimony as to whether any representation as to tonnage or percentages of ore were made and as to what occurred at this meeting in Denver,** It therefore becomes necessary to consider all the surrounding circumstances in **weighing the evidence** for the purpose of ascertaining the truth with reference to what actually took place." x-x-x

(App. Op. Br. 50)

While boldly announcing that appellant takes issue with the Trial Court on disputed questions of fact upon which they admit the evidence is in sharp conflict, appellant nevertheless asks this Court to pass upon the credibility of the same witnesses and weigh the same evidence and to reverse the case, and this too in the teeth of the long and firmly established rule of this Court that where the findings of the Channcellor who saw the witnesses, depends upon conflicting testimony or upon the credibility of witnesses, such findings are unassailable so far as there is any testimony consistent with such findings.

"The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends they are contrary to the weight of the evidence. The Trial Court made findings after an evidently careful and pains-

taking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credibile testimony of reputable witnesses. Upon settled principles, which this Court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

Butte etc. Copper Co. v. Clarke-Montana Realty Co.

(C. C. A. 9th Cir.) 248 Fed. 609-616.

(affirmed 249 U. S. 12; 63 Law. Ed. 447-459)

"x-x so far as it (finding of trial court) depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

Davis v. Schwartz, 155 U. S., 631; 39 Law. Ed. 289-293.

"The case having been tried without the intervention of a jury, the Court's findings are conclusive of the questions of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the Court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made."

Cook v. Robinson, (C. C. A. 9th Cir.) 194 Fed., 753-759; and cases cited by the Court.

"Another equally well-established rule of law is that while the findings of the chancellor in an equity case on conflicting evidence, have not the conclusive effect given to the verdict of a jury or of the trial judge when a jury has

been waived, they are entitled to high consideration, and unless clearly against the weight of the evidence, or induced by an erroneous view of the law, they will not be disturbed by the appellate court, **and this applies with greater force when practically all the testimony was taken in open court, affording the trial judge the opportunity to note the demeanor of the witnesses for the purpose of determining their credibility, which the appellate court hearing the case on a printed record, can not.**"

(Boldface ours.) .

Unkle v. Wills, (C. C. A. 8th Cir.) 281 Fed., 29-36.

" x-x so far as the finding of the master or judge who saw the witnesses" 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

Adamson v. Gilliland, 242 U. S., 350; 61 Law. Ed. 356-357.

See also to same effect:

United States v. Porter Fuel Co. (C. C. A. 8th Cir.) 247 Fed., 769-773.

Black v. Aronson, (C. C. A. 8th Cir.) 187 Fed. 241-244.

Snow v. Snow, 270 Fed., 364-366-367.

American Rotary Valve Co. v. Moorehead, (C. C. A. 7th Cir.) 226 Fed., 202-203.

Porto Rico Mining Co. v. Conklin, (C. C. A. 8th Cir.) 271 Fed., 570-577.

THE BURDEN OF PROOF IN CASE OF FRAUD INCLUDES THE REQUIREMENT THAT THE PROOF MUST BE CLEAR AND

CONVINCING.

Not only is Taylor's testimony, as to the alleged fraud, in sharp and hopeless conflict with the evidence of the defendants but, as we contend, he discredited himself by his contradictory statements, and besides his whole story was met and completely refuted by the testimony of Poole, Murrish and Nenzel and by the documentary evidence adduced.

> "To establish fraud, the proof must be clear, unequivocal and convincing. Jones v. Simpson, 116 U. S. 609, 6 Sup. Ct. 538, 29 L. Ed. 742; Thorwegan vs. King, 111 U. S. 549, 4 Sup. Ct. 529, 28 L. Ed. 514; Walker v. Collins, 59 Fed. 70, 8 C. C. A. 1; Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107; Schagun v. Scott Mfg. Co., 162 Fed. 209, 89 C. C. A. 189. Proofs which only create a suspicion are not sufficient to warrant a finding of fraud. United States v. Hancock, 133 U. S. 193, 10 Sup. Ct. 264, 33 L. Ed. 601; United States Fid. & Guar. Co. v. Des Moines Nat. Bank, supra. A mere preponderance of evidence, which at the same time is vague or ambigious, is not sufficient to warrant a finding of fraud, Lalone v. United States, 164 U. S. 255, 17 Sup. Ct. 74, 41 L. Ed. 425."
>
> In re Hawks, 204 Fed., 309-316.

The case infra was an action for damages for alleged false representations. The defendant requested the trial court to instruct the jury, "that unless the **evidence clearly shows** that defendant, with intent to defraud the plaintiff, falsely represented etc.", that then they must find for the de-

fendant. The trial court refused to give the instruction and the U. S. Supreme Court held that the instruction contained a correct statement of the law and reversed the case for the refusal to give it.

Thorwegan v. King, 111 U. S., 549, 28 L. Ed., 514-516.

TAYLOR'S DEMAND IS UNCONSCIONABLE AND EQUITY WILL NEVER ENFORCE AN UNCONSCIONABLE DEMAND.

Even if all that Taylor claims respecting the representations of 60,000 tons or over 1.75% ore were true, his own evidence shows that he did nothing and expended no money in reliance on such representations. From April 2 until he left for the East about April 27th, Taylor did nothing in the way of expending either money or time. True, on April 17th he wrote a letter regarding the property to Crucible Steel Co. and sent a duplicate to McKenna but in as much as that letter referred to there being **43,000 tons** in the mine, he evidently was not then relying at all on Poole's alleged 60,000 tons representation. He left for New York City about April 27th but he admits he had other business taking him East, so this trip and expense thereof in latter part of April is at most only partly referable to the April 2 contract,—how much or how little Taylor's evidence wholly fails to show.

Whether it was at Thane's insistence or not is immaterial. But the important fact is that it was

while he and Thane were on the train East, about April 27th that the matter of an independent examination by Bancroft came up and Taylor agreed to it and he tells us that after having determined on such independent examination he wouldn't expend time or money unless the results of such examination justified it.

The defendants received absolutely nothing of value or benefit from anything Taylor did, either before or after he had determined upon Bancroft's examination. After June 16, when Taylor's option had, by its express terms, terminated, the defendants sold the property to defendant Loring for $333,333.33, which paid off all the corporate indebtedness and left about $133,333.33,—money's available for distribution to stockholders. If Taylor's contentions be upheld he would come into 62% of this sum or about $82,666.66, an unconscionable return to him for any services or outlays (we contend there were absolutely none) he may have rendered or incurred in reliance on Poole's alleged representations.

The rule prevaling in most jurisdictions and which prevails in the United States Courts is that equity will not lend its aid to carry out an unconscionable bargain.

> "In other words, these complainants are asking the interposition of a court of equity to establish their title to property worth over half a million dollars, obtained by purchase of execution sales for $275. The immense dispro-

portion between the value and the cost shocks the conscience of a chancellor and forbids the supporting action of a court of equity. Some rights must have suffered and some wrongs must have been done by such a transaction, and a court of equity properly says that it will not lend its aid to further such an unconscionable speculation."

Jencks et al v. Quidnick Co. 34 L. Ed. 200-203; 135 U. S. 457.

"The defendant has received no benefit whatever from the contract. It would be contrary to the principles of eternal justice, and in violation of all the rules of equity in the exercise of its extraordinary powers, to allow the syndicate to recover the bonus. The rule is universal that a specific performance will always be refused "when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and when the specific enforcement would be oppressive upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice."

Nevada Nickel Syndicate v. National Nickel Co., et al. (C. C. Nev.) 96 F. 133-153.

"Courts of equity have often decreed specific performance where the consideration was inadequate, and it may be said in general that mere inadequacy of consideration is not of itself ground for withholding specific performance unless it is so gross as to render the contract unconscionable. But where the consideration is so grossly inadequate as it is in the present case, and the contract is made without any knowledge at the time of its making on the part of either of the parties thereto of the na-

ture of the property to be affected thereby, or of its value, no equitable principle is violated if specific performance is denied, and the parties are left to their legal remedies, if any they have."

Marks v. Gates (C. C. A. 9th Cir.) 154 F. 481-483.

"The purchaser, Cromwell, stands in no better position. He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of $30,000 worth of stock for which he paid only $50. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law. This has been so often held on bills of specific performance, and in other analogous cases, that it is unnecessary to spend argument on the subject."

The Mississippi and Missouri Railroad Co. et al v. Cromwell 23 L. Ed. 367-368; 91 U. S. 643.

PLAINTIFF'S ASSIGNMENTS OF ERROR ARE EACH AND ALL FATALLY DEFECTIVE.

Plaintiff has attempted to assign errors (Rec. 1469-1472). Assignments I, II and VIII are too general to be noticed by this Court, and will be disregarded.

Rule 11, also Rule 23, sub-division 8.

Doe v. Waterloo Min. Co. (C. C. A. 9th Cir.) 70 Fed. 455-461. (construing and applying Rule 11.)

United States v. Ferguson (C. C. A. 2nd Cir.) 78 Fed. 103-105.

Fourth National Bank v. City of Belleville (C. C. A. 7th Cir.) 83 Fed., 675.

Lloyd v. Chopenall (C. C. A. 9th Cir.) 93 Fed., 599-600-601.

Deering Harvester Co. v. Kelly (C. C. A. 6th Cir.) 103 Fed., 261-264.

"An assignment x-x which compels court and counsel to look further and to search the brief in order to discover them (questions to be considered) entirely fails to accomplish the purpose of its being, and is utterly futile."

Sovereign Camp v. Jackson, (C. C. A. 8th Cir.) 97 Fed. 382-385.

Plaintiff's remaining assignments being Nos. III, IV, V, VI and IX, are subject to the objection of being too general and also to the objection that each and all of them are **aimed at the opinion** of the trial court and **not at the decree.** Such attempted assignments are wholly unavailing to appellant.

Smart v. Wright (C. C. A. 8th Cir.) 227 Fed. 84-85.

McFarlane v. Galling (C. C. A. 7th Cir.) 76 Fed., 23-24.

Crawford v. Fayetteville etc. Co. (C. C. A. 8th Cir.) 212 Fed., 107-109.

In view of the appellant's **admission** (Op. Br. 20-50) that there is a sharp conflict between the testimony on behalf of plaintiff and that on behalf of the defendants respecting what is really the one vital and controlling question in the case, no question is made, and we say no question can be made, that the findings of the trial court (Rec. 1437-1438)

that defendants made no false or fraudulent representations, and that plaintiff was not deceived and and that he was never ready, able and willing to perform, are not each and all supported by "credible evidence." This being so there can be no "obvious mistake of fact" in the findings of the trial court. The appellant has not pointed out, or attempted to point out any error whatever in the application of the law to the facts as found by the trial court, and in this situation we say that the case is squarely within the general rule firmly established in the U. S. Circuit Court of Appeals, that said court will not disturb the findings or the judgment of the trial court.

DATED: Reno, Nevada, October 17th, 1923.

Respectfully submitted,

H. R. COOKE

and

(COOKE, FRENCH & STODDARD, on Brief.)

Attorneys for all appellees except W. J. Loring.

No. 3902

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID TAYLOR,

Appellant,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES COMPANY (a corporation), TUNGSTEN PRODUCTS COMPANY (a corporation), MILL CITY DEVELOPMENT COMPANY (a corporation), W. J. LORING, C. W. POOLE, R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN, C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A. TWIGG, J. C. HUNTINGTON and LENA J. FRIEDMAN, individually,

Appellees.

REPLY BRIEF FOR APPELLEE W. J. LORING.

JOHN F. DAVIS,
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Attorneys for Appellee W. J. Loring.

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DEC 5 - 1923

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REPLY BRIEF FOR APPELLEE W. J. LORING.

Appellee W. J. Loring respectfully requests permission to file this closing brief in answer to some of the contentions of appellant presented in his reply brief, feeling it may aid the Court in the consideration of the matter therein presented, particularly in view of the fact that it did not have the opportunity of the Trial Court in the matter of hearing the evidence.

Opinion of the Trial Judge.

The opinion of the trial judge contains an able, exhaustive, and painstaking review of the evidence taken in open Court, and, therefore, necessarily contains a large number of references to the Transcript, but the numbers of the pages of the typewritten Transcript do not, of course, conform to the corresponding pages of the printed record. As this appeal Court is without any copies of the typewritten Transcript, this Court, in case it should desire to read any of said evidence referred to in the opinion, would be without any guide to the pages referred to. In order to supply the Court with the information lacking in this regard in the printed record, the opinion is here reprinted, and wherever the Judge has made reference to a page of the typewritten Transcript, the corresponding page of the printed record is inserted in brackets, next thereto, as follows (italics and interpolations in brackets are ours):

FARRINGTON, District Judge:

Throughout this decision the different corporations will be designated as Tungsten Company, Products Company and Development Company respectively.

January 16, 1919, plaintiff Taylor and the two defendants, Tungsten Company and Products Company, entered into a contract, a copy of which is attached to the complaint, in which Taylor agreed to advance $100,000, and the two companies engaged to

deliver to him at specified dates 170 tons of scheelite concentrates of certain guaranteed qualities. On the same day the defendants Friedman, Poole, Nenzel, Jones, Murrish, Hinch, Huntington, Goodin, Twigg and Lena Friedman, granted Taylor an option on all their interest in the three corporations for a total purchase price of $498,400, agreeing that all debts and obligations of the said companies should be satisfied out of the purchase money, and that the option should be good up to and including July 16, 1919. Later, and on the same day, January 16, 1919, Taylor, B. D. Thane and Howland Bancroft signed a writing, in which it was stated they mutually agreed that Taylor should use his best endeavors to carry out the terms of the option, make a sale of the property, and in the event of success, the profits should be divided, 60 per cent to Taylor, 20 per cent to Thane, and 20 per cent to Bancroft. Thane released all his claims to Taylor under this contract September 11, 1920. Bancroft's interest was understood to be in payment for his professional services. He retained it until March 29, 1920, and was otherwise compensated, because he "refused to testify as an expert for anybody as an interested party." (Transcript, p. 197.) [Record, p. 261.]

Beginning on the following day, January 17th, Bancroft made a ten-days' examination of the mine, and on February 15th reported as blocked out 8,111 tons of ore averaging 1.75 per cent WO3; and two thousand to three thousand tons unsampled. His

conclusion was that "From many viewpoints the property is one of the most favorably situated tungsten mines in the United States. It is one of the few containing an ore-body which is commercial under pre-war market prices for this product and present high prices [of] labor, supply and material conditions. At a market price of $6.25 per unit, treating 100 tons of ore per day with an 80% recovery, tungsten ore from this ore body will pay expenses if it runs 1% W03. (As previously stated, the average tenor of the 8111 tons of indicated ore is 1.75% W03. The average market price of tungsten trioxide for 10 years prior to the war was $6.93 per unit.)"

February 24th Taylor wrote there was no chance of interesting anybody in the purchase of the property at a half million dollar price, and suggested that the best thing to do all around was to close down the mine. After considerable correspondence relative to modifying the option, Poole, Nenzel and Murrish, representing stockholders, proceeded to Denver, arriving Sunday, March 30th. April 2d a new agreement was executed, a copy of which is attached to the complaint, marked Exhibit "C". In this agreement Taylor undertook to secure by borrowing for said companies, on or before June 16, 1919, a sum sufficient to liquidate the indebtedness of the Tungsten Company, the Products Company, and the share of the indebtedness of the Development Company which the second parties owed. The indebtedness was estimated to be $220,000. The

parties of the second part covenanted and agreed to deliver to Taylor in full payment for his services 62 per cent of the issued capital stock of the Tungsten Company, 62 per cent of the issued capital stock of the Products Company, and 62 per cent of one-half of the issued capital stock of the Development Company, if on or before said date he secured a sum sufficient to liquidate the indebtedness as provided. It was further agreed that a deposit of the amount necessary to liquidate the indebtedness in the Wells Fargo Nevada National Bank "should be sufficient evidence of the performance of the conditions herein, for the transfer and delivery of the stock as herein provided." It was also provided that the sum so raised should be a loan to the three companies, and not payment for stock, and should be evidenced by the issue of redeemable preferred stock, "with a maximum of 7 per cent cumulative interest". The stock was not to be sold for less than 95 per cent of par, net to the company. The second parties agreed to cause a new company to be organized to which the assets of the three corporations should be conveyed, or to amend the present articles of the three companies "in order to effectuate this agreement as shall be required by the first party." Certain provisions to be made in such incorporation or amendment were specified. It was also provided that the contract should expire June 16, 1919, and carry with it the option of January 16th, and that time should be of the essence of the agreement.

In May, Bancroft again examined the mines. On the 22d instant, while the examination was in progress, he received a letter dated May 20th, from Taylor, stating that his attorney Jackson was planning to leave New York May 23d for Lovelock.

"I do not," so the letter reads, "wish to go to this expense if your examination does not check up our idea that there is at least 40,000 tons of ore assured, with probabilities of a big additional tonnage, so that, if upon receipt of this letter you can give me any idea as to whether you think the tonnage is there or not, I wish you would wire me either 'advise postponing lawyer's trip,' or 'advise having lawyer leave at once.'—If it is in any way possible I want to get the deal closed before the first of June." (Exhibit "K".) [Record, p. 910.]

May 22d Bancroft wired Taylor:

"Your letter 20th just received. Required tonnage exposed on at least two sides. Can give no positive assurance regarding tungsten contents until receipt of assay returned. Believe property will hold up and my former favorable opinion remains unchanged." (Exhibit 1.) [Misprint for Exhibit "I"; Record, p. 908.]

On the next day, May 23d, Taylor wired the Tungsten Company at Lovelock:

"Bancroft's estimate satisfactory. Have auditors wire us approximate indebtedness. Our lawyer Jackson due Lovelock Wednesday night or San Francisco Thursday night. Would Murrish prefer

have him stop Lovelock on way out, or meet him San Francisco." (Exhibit 23.) [Record, p. 829.]

The Tungsten Company replied, asking that Jackson stop at Lovelock, and stating the accounts payable were $5000 in excess of estimates; that overcharge on freight and adjustments would probably reduce that amount $4000, and that the excess could be satisfactorily explained. (Exhibits "S" and "T".) [Record, pp. 921, 922.]

May 26th Taylor wired Poole, who was then in Washington:

"Nenzel now reports indebtedness five thousand more than estimated. Believe your presence Nevada imperative if any deal to be closed." (Exhibit 2.) [Misprint for Exhibit "Q"; Record, p. 919.]

And on the 28th he wrote Poole that the statement of indebtedness given him April 30th was not an estimate, but the exact statement of accounts on that date; that neither he nor Thane could go to their people and ask them to advance the additional $5000; that he could not himself take care of this additional loan, because he would have to dig to the bottom of his pockets to raise the necessary $150,000 which would be available in cash June 2d, and suggested a method by which the stockholders of the mine could take care of this $5000 themselves. (Exhibit "E".) [Misprint for Exhibit "P"; Record, pp. 916, 917.] Thane expected to advance $25,000 of the $150,000, but on the 29th he wired Poole from New York to arrange with his associates for an

extension of thirty days on this $25,000. (Exhibit 25.) [Record, p. 831.]

On the 30th, while Taylor was enroute from Denver to Lovelock, he wired Thane as follows:

"Bancroft original tonnage estimate all right but large part not commercial thus accounting for only 20,000 tons average recoverable tungsten 1.46 per cent tungstic acid showing sure profit of only hundred thousand dollars. *Will endeavor* extend present option six months *having friendly bankrupt proceedings and myself appointed receiver make Poole superintendent* build assay office get assayer at mine and make agreement with court that we will exercise option whenever Bancroft will certify to 40,000 tons of 1.4 recoverable developed ore on at least two sides. *Bancroft still believes general prospects for big cheap mine excellent.* On this basis will you agree to take twenty-five thousand on same basis when requisite tonnage and grade developed? If you approve suggest wiring Poole urging him to favor this plan address Lovelock Saturday." (Exhibit "L".) [Record, pp. 911-912.]

The telegram indicates Taylor contemplated a better bargain, not a relinquishment of any of his right to purchase the property.

During the first week in June, Taylor with his attorneys Jackson and Bayless, was in conference with the defendants Poole, Murrish, Nenzel and Jones, in San Francisco. Jackson testified that he and Taylor wanted to go to San Francisco, because

they felt it would be possible, with the co-operation of creditors, to make a deal on substantially the lines of the April 2d contract, with advances prorated to the condition of the mine as disclosed by Bancroft; it seemed to them that San Francisco was a better place to negotiate.

Poole testified that Taylor told him not to tell his associates in the Tungsten Company that Bancroft's report was unfavorable.

"He said, 'I want to go on down to San Francisco and arrange a new deal, and if they know that I am not going through with this deal they probably won't go. I think I can deal with them better in San Francisco than I can here.' He says, 'You owe good money, don't you'? I said 'Yes, we owe money.' 'Well,' he says, 'I want to see Goodin, and have him come to San Francisco, and if these fellows get obstreperous he can put the screws to them.'" (Trans., p. 397.) [Record, p. 525.]

Loring testified that about June 25th, or some time after the middle of June, he had breakfast with Taylor at the Belmont Hotel in New York. During the conversation Taylor stated that the mine had not developed in accordance with his anticipations; that it "had developed 19,800 tons of ore, but by a stretch of imagination he could bring it up to 23,000 odd tons. I don't remember the exact tonnage that he had set out to develop—a larger tonnage. 'Well', I said, 'then you don't propose to go on with the deal?' He said 'I do.' He said, 'I am going to take

the mine away from the boys, or away from Friedman,' or something to that effect, and looked me right in the eye when he said it." (Trans., p. 543.) [Record, p. 714.]

Jackson testified that at the San Francisco conference he stated to Murrish and his associates that Taylor's reason for entering into the contract of April 2d was Poole's statement in Denver that the mine contained 60,000 tons of commercial ore, and it now developed that the representation was a mistake, as Bancroft who had just examined the mine, reported there were but 20,000 tons.

Taylor's proposal for a new agreement, embodied in a writing presented to the defendants at San Francisco (Exhibit 17) [Record, pp. 813-822], provided for the organization of a new corporation, to which should be conveyed the assets of the Tungsten Company, the Products Company, and one-half of the issued stock of the Development Company. *The officers of the new company were to be Taylor president,* Thane managing director, *Poole mine superintendent,* directors, Taylor, Brown, Friedman, Poole and a representative of the creditors. Taylor on his part was to purchase $85,000 of the company's bonds, paying 95 per cent of their face value, the bonds to draw 7 per cent interest, and to be a first lien on all the ore blocked out in the mine. The money derived from the bonds thus sold to Taylor was to be applied, $10,000 for working capital, the remainder in payment of creditors' claims under $500; and a dividend of about 45 cents on the dollar

to other creditors. The creditors were to agree to defer enforcement of their claims until Taylor should have reduced the mortgaged ore to concentrates; the concentrates were to be sold by Taylor, and the proceeds applied, first, to the expenses, and second, to the redemption of the bonds. It was further provided that when an engineer selected by Taylor certified that 20,000 tons of additional ore were blocked out, Taylor was to purchase additional bonds at 95 per cent of the face value, bearing 7 per cent interest, secured and paid as the first bonds, sufficient in amount to liquidate the debts, but no more than enough to net the company $65,000 for that purpose. Sixty-two per cent of the stock in the new company was to be issued to Taylor for his services. Each and all of the creditors were to jointly and severally agree not to take or commence any proceedings against the new company which would in any manner embarrass Taylor in the collection of his advances. And finally, the agreement was not to become effective, unless creditors owning 95 per cent in amount of the scheduled claims in excess of $500, became parties thereto. (Exhibit "A-1".) [Record, pp. 935, 936.]

This proposed agreement was rejected by the creditors as well as by the stockholders.

July 1st [21st], defendant Loring sought an option on the property, which, as finally arranged, contemplated the payment by Loring of $333,333.33 in nine payments, the first $50,000 to be made September 1, 1919, the last, of $25,000, February 4,

1921. Out of these payments the debts, then estimated to be $200,000 were to be paid. August 10th Taylor wired Loring asking what interest the latter had bought in the Tungsten property, stating that the companies and the stockholders owed him considerable money, and that his attorneys considered he had a good case for compelling present stockholders to assign him control of the stock of both companies, or as an alternative, heavy damages. (Exhibit 28.) [Record, p. 834.] On the next day Loring replied that he held an option on the Nevada Humboldt interest. (Exhibit 29.) [Record, p. 835.] August 16th Taylor commenced two actions in this court; the first against the Tungsten Company and the Products Company, number 2262, to recover the sum of $9,179.44, as the balance due on account for money loaned. This action was settled by the payment to Taylor of $7,334.04, in December, 1919, and February, 1920. *The evidence shows that Taylor's attorneys received the payments in the knowledge or belief, as was the fact, that this money came from payments made by Loring on the purchase price of defendants' properties.* (Trans., p. 563.) [Record, pp. 668-672; 740.]

The second action, number 2263, was brought August 16, 1919, against Poole, Nenzel, Murrish, Friedman, Jones, Hinch, Goodin, Twigg, Huntington and Lena Friedman, to recover the sum of $114,579.44 damages. The complaint was sworn to by Taylor August 9, 1919, one day before he wired Loring asking what if any Nevada Humboldt inter-

ests the latter had bought. In it was set forth the same matters which are set forth in paragraphs 4, 5, 6 and 7 of the complaint in the present case, the substance of which is that the defendants last named had agreed to convey to him 62 per cent of the issued capital stock of the Tungsten Company, a similar portion of the stock of the Products Company, and 62 per cent of one-half of the issued capital stock of the Development Company, in consideration of his raising by borrowing for said companies sufficient money to pay their debts; that in order to induce him to enter into the contract of April 2, 1919, they had falsely and fraudulently represented to him that there was in said mines on that date, blocked out and ready for mining, "over 60,000 tons of scheelite ore, which would carry from 1.50% of tungstic acid to 1.75% tungstic acid"; that plaintiff, believing and relying on such representations, entered into the contract, and incurred expenses in the sum of $8,820.21; that he had given his sole time and attention to raising said moneys until about June 1st, when he learned that the representations were false, whereupon his associates, who had agreed to furnish a large portion of the money called for by the contract, declined to do so. He also alleged that if defendants' representations had been true, the ores would have had a net value of more than $320,000, and the net value of the mines above the indebtedness of the companies, would have been $170,000; that the corporations were then, and each of them was, wholly

insolvent; that the total value of the assets did not exceed $120,000; that the ore in sight April 2d was not of any greater value than $70,000; that the fair value of plaintiff's 62 per cent of the stock, if the representations had been true, would have been $105,400; and that by reason of such false representations he had been damaged in the sum of $114,579.44.

On the same day that the action for damages was commenced a written agreement was executed in which the Tungsten Company and the Products Company covenanted to sell their properties to Loring, and he agreed to pay a third of a million dollars therefor. (Exhibit "A-12".) [Record, pp. 991-1014.] This contract was ratified and approved by the owners of more than 95 per cent of the issued capital stock of the Tungsten Company, and by the owners of all the issued capital stock of the Products Company.

At the meeting of the stockholders of the Tungsten Company, held August 23, 1919, Taylor's protest was received, read and filed. The only expressed grounds of his objection were that the meeting was called without authority of law; that the proposed action was beyond the authority of the directors or of the stockholders; that no proper, sufficient or adequate notice had been given of the meeting, and that in ratifying or confirming the action of the directors of said corporations in entering into any agreement of purchase and sale of all its property, they would be exercising powers not

granted to the directors of the corporation, or to its stockholders.

September 26th, after Loring had made his first payment of $50,000, Taylor served notice on the Tungsten Company and its board of directors, and also on Friedman and his associates, demanding that the stockholders meet immediately, and set aside the action whereby they had authorized contracts with and conveyances to Loring; that appropriate actions or suits be commenced to declare the conveyances null and void, because the stockholders' meeting of August 23d was held without proper notice, and because neither the corporation, its board of directors or its stockholders had authority to execute conveyances disposing of all the corporate property.

October 16, 1919, Taylor brought a suit in this court against Loring and the Tungsten Company, asking that all conveyances, deeds, assignments and bills of sale executed by the company to Loring, the contract of August 16, 1919, between Loring and the Company, and the ratification of the same by the stockholders, be set aside. Prior to this suit, designated as B-1, Loring had paid in performance of his contract with the Tungsten Company and the Products Company the sum of $100,000.

April 17, 1920, Taylor commenced the present suit. In his complaint he alleges that after he had notified Friedman and associates that he probably would not be able to exercise his option under the contract of January 16, 1919, the defendants Poole,

Murrish, Nenzel and Friedman, (1) by means of telegrams and letters informed plaintiff that further and new development work in said mines had placed in sight large quantities of scheelite ore of commercial value; (2) that about April 2d, 1919, the defendants Poole, Murrish and Nenzel, at Denver, Colorado, represented to him that since the examination of the mining claims by Bancroft, additional ore bodies of equal grade and quality had been developed, and that there was then blocked out over 60,000 tons of scheelite ore, which would carry an average of 1.75 per cent tungstic acid; that each and all of said representations were false and untrue, and were known by the defendants to be untrue, and were made for the purpose of deceiving plaintiff and causing him to undertake and carry out the terms of the contract of April 2d; that in reliance on said representations he entered into the contract, gave his time and efforts, and expended more than $8,000 in carrying out his obligations thereunder, until about June 1st, when he discovered the representations were false; then his associates, who had agreed to furnish a large part of the money, refused to advance any more. In addition, plaintiff alleges full performance on his part; refusal of the defendants to organize a new company, or amend the articles of incorporation of the Tungsten Company, or deliver the 62 per cent of their stock; that the stock at and before the commencement of the suit had no market value; that there is no method of ascertaining the amount of damages plaintiff has

or will suffer; that defendants had contracted to sell the property to Loring; that meetings of the stockholders to ratify and confirm the contract were without adequate notice; that plaintiff promptly demanded a rescission of the sale, but the officers, directors and stockholders refused to set aside the pretended conveyances to Loring or to commence any action; that Loring took said contracts and deeds with full notice of the plaintiff's rights, and was regularly informed thereof before he had in any wise performed any part of the contract; that another meeting of the stockholders of the Tungsten Company had been called for April 19, 1920, to further authorize and ratify the sale to Loring, and unless restrained by order of this court, the 62 per cent of the capital stock, which is the rightful property of plaintiff, would be voted in favor of authorizing such sale, to the great and irreparable injury of plaintiff; that about June 1, 1919, plaintiff offered to perform each and every covenant on his part to be performed, provided defendants would allow him an abatement of certain terms therefor for and on account of said false and fraudulent representations; and that plaintiff has no plain, speedy and adequate remedy at law;

"Wherefore, plaintiff prays judgment and decree of this Honorable Court, decreeing that the defendants Poole, Nenzel, Murrish, L. A. Friedman, Jones, Hinch, Goodin, Twigg, Huntington and Lena J. Friedman be compelled to specifically perform their said contracts and deliver to the plaintiff 62 per cent

of the stock of the Nevada Humboldt Tungsten Mines Company, 62 per cent of the stock of the Tungsten Products Company and 62 per cent of the stock of the Mill City Development Company; that plaintiff have an abatement of the provision of said contract, or of the whole thereof for and on account of the false and fraudulent representations of the defendants, as shall be determined by the Court to be just and equitable";
that defendants last named be enjoined from voting said 62 per cent of said capital stock at any stockholders' meeting, in favor of any disposition of said property to Loring, or to any one else, until further order of this Court.

This suit was not commenced until after the Tungsten Company and the Products Company had received from Loring on the purchase price of their property $250,000, and Taylor had received out of that sum $7,334.04 in settlement of his action number 2262, and not until after the debts of the companies had been paid.

Taylor's whole case rests on the truth of his allegations that false and fraudulent statements were made to him, and that he relied on them to his prejudice. The burden is on him to prove these allegations by a fair preponderance of the evidence. This in my judgment he has failed to do.

The first charge of misrepresentation is as follows: Poole, Murrish, Nenzel, and Friedman, for

the purpose of inducing plaintiff to undertake the contract of April 2d,

"Falsely and fraudulently and by means of telegrams and letters informed plaintiff that further and new development work had been carried on within said mines, mining claims and mining rights of the Nevada Humboldt Tungsten Mines Company, which had developed and placed in sight, blocked out and made ready for mining, large quantities of scheelite ore of commercial value, and capable of being concentrated, and the concentrates so returned being of great value."

About the middle of February, Taylor had Bancroft's report, showing in the mines 8111 tons of ore, commercial with tungsten selling at $6.00 per unit; that the average price for ten years before the war had been $6.93; that "the average tenor of the ore was 1.75% tungsten trioxide"; and that at a market price of $6.25 per unit, treating 100 tons per day with an 80 per cent recovery, the ore would pay expenses if it carried 1% tungsten trioxide. February 14th Nenzel wrote Taylor that conditions at the mine were exceptionally bright:

"On the number two south working we have opened up an ore body which is over 15 feet wide and a good grade of ore. On the number one south * * * yesterday we relocated the ore which is of a good grade." (Exhibit 2.) [Record, p. 782.]

Ten days later, February 24th, Nenzel wired Taylor as follows:

"The number one drift south is 85 feet beyond granite dyke. (1) Ore low grade. Drift number one 60 feet beyond Bancroft sampling. Number two south tunnel 60 feet beyond Bancroft sampling. (2) Value of ore 1½ per cent. Number 2 north 275 feet from shaft, average width of vein 9 feet; (3) ore milling 1%. Number 2 south 100 feet beyond Bancroft sampling. Average width of vein 4½ feet. (4) Value of ore one-half of one per cent. Number 3 north drift 60 feet from shaft. Vein 10 feet wide. (5) Value of ore 1½ per cent. Number 3 south 55 feet from shaft. Five feet wide. (6) 1% ore. (7) Main working shaft has been advanced 24 feet all in good ore." (Exhibit 3.) [Record, pp. 783, 784.] (The numbering in the last telegram is mine.)

Tested by Bancroft's assays (Exhibit 19) [Record, pp. 824-826, and Plate No. 5-A] item 1 is correct. Item 2: Bancroft's assay taken 60 feet beyond his first sampling in number 2 south was 2% instead of 1.50%. The average of Bancroft's seven assays in that drift was .63%. Item 3: Bancroft's assay taken 275 feet north from the shaft in number two was 1.60% instead of 1%. Item 4 seems to be inaccurately designated. Item 5: Bancroft's nearest assays 60 feet north on number three, were 1.20% and 1.35% instead of 1.50%. Five assays taken by Bancroft within 60 feet from shaft averaged 1.89%. Item 6: Bancroft's nearest assays, 55 feet south from the shaft on number three, were .35% and .75% instead of 1%. Six assays taken by

Bancroft within that 55 feet averaged 1.12%. Item 7 is correct.

How and to what extent Taylor was misled by these telegrams is shown in his letter written February 24th to Nenzel in which he says:

"In view of the present tungsten situation, I do not believe there is the remotest chance of interesting anybody in the purchase of a property at half a million dollar price. The best thing to do all around would be to close down."

This is followed by an inquiry as to whether defendants would consider selling their stock to him at a reduced price. (Exhibit 1.) [Record, p. 779.]

March 7th Taylor wrote the company that the results of the development work in the mine were most gratifying, and if

"they continue as well, I think there is a chance that by the beginning of April I may be able to persuade some New York people to advance the necessary money, and clean up all the companies' indebtedness in return for some modified form of an option."

March 10th Nenzel wrote Taylor that the main shaft had been sunk to a depth of 60 feet

"since our telegram to you giving the new development work, and we are glad to inform you that we have encountered some very rich ore. The ore contains so much scheelite that we are unable to handle more than 40 tons per 24 hours in the mill when working on ore taken from the shaft. How long

this will continue we do not know, but it certainly looks very encouraging."

This was literally true. At the time the letter was being written they were sinking through ore assaying, according to Bancroft, 3.55 per cent and 2.45 per cent tungstic acid, and they had just passed through some assaying as high as 5.00 per cent. (Exhibit 19.) [Record, pp. 824-826 and Plate No. 5-A.]

On the following day, March 11th, Taylor wrote the Tungsten Company, refusing to advance $15,000 on a carload of ore to be shipped. He did not believe that a bona fide bid of more than $6.00 per unit for tungsten could be gotten out of any domestic customer.

"It is possible," he says, "if I could talk the general situation over with some of you we could arrive at some solution of the entire matter. Possibly Mr. Murrish or some of the rest of you could come to Denver, and if they come over with the idea of some financial rearrangement, it would be well for them to have a balance sheet with books, and a full statement showing the amount and present status of all the indebtedness."

March 12th Nenzel wired that the mine never looked so good. On the 21st Friedman wrote Taylor: "The mine is looking better than ever." March 25th Friedman wired Taylor, suggesting that he and Bancroft come to Lovelock for a conference as to modifying the option, and said:

"I am sure you will find mine development fulfilling your most sanguine expectations. I am confident that we could arrive at some modified arrangement as suggested in your correspondence."

On the same day, March 25th, Taylor wrote Friedman that neither he nor Bancroft could go to Lovelock, and suggested that Friedman or Poole come, or that Poole, Murrish and Nenzel be appointed a committee by the stockholders to readjust the option. "Regarding the exercise of the option, it certainly looks pretty blue at present." For a readjustment he suggested some arrangement whereby cash could be furnished to liquidate all the company's indebtedness, and he acquire 75 per cent, or all of the stock of the company, and pay for it out of future earnings.

March 27th Nenzel wrote Taylor that no accurate survey of mining development had been made since Bancroft's examination of the mines in January. He also said they had drifted both north and south from the shaft on the fourth level, "all in exceptionally high grade ore." Bancroft later took two assays, one on the face of each drift, and about 15 feet from the shaft. The returns were 1.40 per cent and 1.45 per cent.

A comparison of Bancroft's two reports (Exhibits 15 and 19) [Record, pp. 803, 1473-1488 and plates, 824-826 and Plate No. 5-A] shows that there was twice as much commercial ore blocked out in May as in the latter part of January. *It also shows*

that the main shaft between the third and fourth levels was sunk in very rich ore. The 24 feet all in good ore mentioned by Nenzel, and the 60 feet by Friedman, were between these two levels. Bancroft reports eight assays or ore in that space as follows: 1.4, 0.75, 1.85, 5.00, 3.25, 1.85, 3.55 and 2.45 or an average of 2.51 per cent.

In view of this correspondence and Bancroft's second report, it is impossible to find that the letters and telegrams in evidence from defendants to Taylor prior to April 2, 1919, contained fraudulent misstatements, or that by anything in such letters and telegrams Taylor was misled.

The second charge of misrepresentation is that Poole, Murrish and Nenzel, at Denver, falsely and fraudulently represented to Taylor that since the examination of the mining claim by Bancroft in January, additional ore bodies had been developed, and that there was then blocked out, in sight and ready for mining over 60,000 tons of scheelite ore which would carry an average of 1.75 per cent tungstic acid; that such representations were false, made for the purpose of inducing him to undertake and carry out the terms of the agreement of April 2d, and were relied on by him to his prejudice.

Taylor swears that Poole made the statement, but Poole denies it, and in his denial is supported by Murrish and Nenzel. They go even further, and say that prior to the time when they had agreed on the terms to be incorporated in the new agreement no statement had been made as to the tonnage in

the mine. This seems unreasonable when we reflect that the selling price of a mining property depends so much on the quantity of commercial ore in sight; but *nowhere in the correspondence between Taylor and defendants subsequent to April 2d and prior to June 1st is there any mention of 60,000 tons of ore in the mine.* It is not mentioned in Taylor's telegram of April 3rd to Bancroft, outlining the terms of the new agreement, or in the prospectus prepared by Taylor and Thane early in May, in which it is stated that on April 1st a new survey indicated ore reserve of 41,000 tons. (Exhibit "U".) [Record, p. 926.] In a letter dated April 17th, addressed to Roy C. McKenna, Vanadium-Alloys Steel Company (Exhibit 33) [Record, pp. 842, 843], and in another of the same date addressed to the Crucible Steel Company (Exhibit 32) [Record, p. 839], Taylor said:

"So far the shaft has been sunk 180 feet below the depth at the time of Bancroft's examination, and one of the upper levels extended. * * * The result is now assured minimum of 43,000 tons of ore."

May 14th Taylor wired Bancroft: "Want your statement that 40,000 tons sure with 1.4 per cent recoverable." (Exhibit "G") [Record, p. 906.] In a letter of the same day (Exhibit "N") [Record, p. 914], Thane urges Bancroft to have his report complete and available in San Francisco before May 31st:

"First on the tonnage in sight * * *. This must be known in order that we may be certain there is sufficient tonnage to absolutely guarantee the $150,000 necessary to close this transaction. * * * If we are able to close it, it will be a good piece of business for all of us."

If, as Taylor states in his telegram to Thane, dated May 30th (Exhibit "L") [Record, p. 911], 20,000 tons having an average recovery of 1.46 per cent tungstic acid shows a sure profit of $100,000, we may safely conclude that 40,000 tons would yield a sure profit of $200,000. If there were 40,000 tons of ore in the mine capable of yielding a profit of $200,000, it would seem to be a profitable venture on Taylor's part to loan the company $150,000 at 7 per cent interest, if his loan were secured as provided in the contract of April 2d, and he received 62 per cent of the capital stock of the company for his services in making the loan. When he entered into the contract of April 2d he had before him Bancroft's table (Exhibit 15, p. 1.) [Record, p. 1473 et seq.], showing with a simple calculation that the net value of 8111 tons at $9.00 per unit would be over $61,000; the net value of 20,000 tons would be about $150,000; of 40,000 tons about $300,000; and of 60,000 tons about $450,000. The price specified in the option of May 16th, paragraph 2, was $10 per unit, *and within one week after the contract of April 2d was executed, the Tungsten Company was offered $9.00 per unit for 100 tons.* (Exhibits 7, 35 and 44.) [Record, pp.

790-792; 845-847; 859-860.] Of course it is possible that Taylor would not have entered into the agreement of April 2d if he had not believed there were in sight in the mine 60,000 tons of commercial ore; *but the testimony, as well as the probabilities, fail to prove it.* His first option, January 16th, fixed a price of $498,400, or fifty cents per share, for Tungsten Company stock. February 24th he suggested the option be so modified that he might advance, as a secured loan with 7 per cent interest, enough money to pay the company's debts and purchase stock at 28 cents per share, to be paid for out of the profits of the mine after the debts were paid. Of this proposition he wrote in the same letter it "means that you would be giving me a one-half interest in the mine for liquidating our present indebtedness." *This proposition was made nine days after the date of Bancroft's first report showing 8111 tons of ore in the mine.* March 7th he thought there might be a chance to raise money to clear up the indebtedness in return for a modified option. March 11th he wrote the tungsten situation was so bad the market value of tungsten would probably not be placed at over $6.00; yet within a month thereafter the company seems to have been offered $9.00. March 25th he wrote that as to exercising the option it looked pretty blue. He suggested raising enough money to pay the debts and the acquisition by him of 75 per cent of the stock, to be paid for out of the future earnings of the mine. (Exhibit 12.) [Record, pp.

797-800.] Eight days later the agreement which is alleged to have been induced by fraudulent representations, was entered into, in which he undertook to secure by borrowing enough money to pay the debts, and for such services he was to be given 62 per cent of the capital stock. *May 23d, after he learned from Bancroft that the required tonnage of 40,000 tons was exposed, but that no positive assurance could be given regarding the tungsten contents until receipt of assay returns, he wired the Tungsten Company that Bancroft's estimate, 40,000 tons, was satisfactory.* (Exhibit 23.) [Record, p. 829.] *The question naturally arises, why did Taylor say that 40,000 tons were satisfactory, if he had been led to believe, and did believe, and would not have entered into the contract if he had not believed that there were actually, 60,000 tons of commercial ore in sight in the mine? It was not until attorney Jackson came to Lovelock, about May 29th, that any mention was made, or any use was attempted to be made, of the alleged fraudulent misrepresentations. There is no hint of it even in his telegram to Thane from Ogden, dated May 30th.* (Exhibit "L", supra.) *Taylor's whole conduct indicates that he was satisfied in January as to the value of the property; that he determined then to secure it. From that time on his single purpose seems to have been to obtain it as cheaply as possible, and with the smallest possible outlay of money on his part.* He TESTIFIED HIMSELF (Trans. p. 85) [Record, p. 118], REFERRING TO THE FIRST DAY OF THE CONFERENCE AT

DENVER, BEFORE ANY STATEMENTS AS TO TONNAGE ARE CLAIMED TO HAVE BEEN MADE: "I WAS WILLING IN A GENERAL WAY AT THAT TIME TO MAKE A CONTRACT ACCORDING TO THE TERMS THAT WERE FINALLY ARRANGED." *And again he testified in relation to Poole's alleged false representations, that he supposed he was merely getting Poole's opinion based on such developments as then existed as to how many tons would probably be there* (Trans. p. 109.) [Record, p. 148.] First he secured an option under which he could acquire the property by paying 50 cents per share for stock, or a total of $498,400. In February he began to urge a modified option, because, as he said, no sale of the property at that price was possible; the tungsten market was bad; the best thing to do all around was to close down the mine. April 2d, a new, and for him a better contract was executed, under which he was to receive 62 per cent of the stock if before June 16th he obtained as a loan to the company enough money to pay its debts, estimated at $220,000. Early in May it was understood that it would be necessary to raise a loan of about $150,000 to pay the debts. Later he was informed there had been a mistake, the debts had been under-estimated about $5,000. He at once wired (to Poole) that he believed Poole's presence in Nevada was imperative if any deal was to be closed. He also wrote Poole two days later, on the 28th day of May, stating that he personally could not take this additional loan of $5,000, because he had to dig to the bottom of his pockets to raise

the $150,000. He asked Poole to talk the matter over with Jackson at Lovelock. On the next day Thane wired Poole to procure for him (Thane) an extension of thirty days to raise his $25,000. *At Lovelock Poole was informed that Bancroft's report was unfavorable, and was cautioned, according to Poole's testimony, not to inform his associates, because if they knew Taylor did not intend to go through with the deal they would not go to San Francisco; he wanted to arrange a new deal, and he thought, as Jackson also testified, he could deal with them better in San Francisco than in Lovelock. About this time, May 30th, in a telegram to Thane, he outlined a plan to have the option of April 2d extended for six months, friendly bankruptcy proceedings, himself appointed receiver, Poole appointed superintendent, agreement with the Court to exercise option whenever Bancroft would certify to 40,000 tons of ore 1.4 per cent recoverable developed. He asked Thane if he approved to wire Poole (the very person who had, as he claims, fraudulently misled him into the agreement of August [April] 2d), urging him to favor this plan. To the telegram is added the illuminating statement: "Bancroft still believes general prospects for a big cheap mine excellent."* [Record, pp. 911-912.] *This plan, could it have been arranged, would have enabled him to operate the mine for six months without advancing or borrowing any money for the creditors.* In San Francisco, June 2d, his proposition, in substance, was to advance

$85,000, instead of $150,000, as a secured loan, of which $75,000 would be distributed to creditors, and $10,000 used for working capital. Taylor was to be president, Thane managing director, *and Poole superintendent of the new company to take over and operate the mine.* When an engineer, to be selected by Taylor, certified that 20,000 tons of additional ore were blocked out, Taylor was to advance not to exceed $65,000 more for the creditors, and for his services he was to receive 62 per cent of the stock. His advances were to be a first lien; all the creditors were to agree jointly and severally, not to embarrass him in the collection of his advances. A meeting of the creditors was called, at which they were informed Poole and his associates would abide by their judgment. The creditors promptly rejected Taylor's proposition.

In my judgment Taylor was neither misled nor deceived by the defendants. He was following consistently an original plan to secure the property for the smallest possible outlay of money on his part. His forecast as to what the creditors would do was at fault; he failed to anticipate the competition of Loring, and made an offer at San Francisco which he must have known would not be accepted if the owners had any alternative.

I find the evidence is not sufficient to show that the alleged false representations as to tonnage in the mine were made; and even if there were such representations, Taylor was not thereby induced to

enter into the contract of April 2d, or to attempt to perform its conditions. That contract, as well as the option of May 16th, expired by limitation June 16, 1919; prior to that date no deposit in the Wells Fargo National Bank of San Francisco of an amount sufficient to liquidate the indebtedness of the defendant corporations was made by or for Taylor. He never performed what he agreed in the contract to do; he never made an unconditional offer of performance, and never prior to June 16th was he actually ready, able and willing to perform unconditionally.

It is unnecessary in view of the conclusions reached on the merits of the case, to determine other issues raised by the pleadings. Plaintiff is not entitled to a decree requiring any of the stock of the Tungsten Company, of the Products Company, or of the Development Company to be delivered to him, or to an order restraining or controlling in any manner the use or voting of such stock.

Let a decree be entered in favor of defendants in accordance with the foregoing opinion.

Appellant's Position on the Appeal Record.

It is the foregoing careful and well-considered opinion of the Trial Court which heard all the testimony, and observed all the witnesses, in open Court, that is attacked by appellant.

There is not a single exception to any ruling of the Court upon introduction of evidence at the trial assigned in the record.

Counsel make no attempt to reply to the point that even the attempted assignments of error Nos. I, II and VIII are too general to be noticed by the Court, under the familiar rule laid down in *Doe v. Waterloo Mining Co.*, 70 Fed. 461; *U. S. v. Ferguson*, 78 Fed. 103, 105; *Hart v. Bowen*, 86 Fed. 877, 882; *Florida Central Co. v. Cutting*, 68 Fed. 587, and *Grape Creek Coal Co. v. Farmers' Loan and Trust Co.*, 63 Fed. 891, and that the remaining assignments (Nos. III, IV, V, VI, VII and IX) are not only open to same objections as that urged above to the other three, but that they are merely attacks on the *opinion* of the Court, contrary to the rule so explicitly laid down in *McFarlane v. Golling*, 76 Fed., at p. 24, and cases cited (see Opening Brief of Appellee Loring, pp. 13-15).

Counsel admit in the opening brief (pp. 20, 35) that their brief and argument on the question of the preponderance of evidence is directed to the *opinion* of the Court.

Not only this, but admitting in their opening brief (p. 50) that there is a conflict in the testimony nevertheless, in the face of the well-established rule of this Court regarding the conclusions of a Chancellor on conflicting evidence *where the Chancellor has had an opportunity to see and observe the witnesses,* they ask this Court to pass upon the

creditibility of these same witnesses and to reverse the Trial Court upon the facts.

Counsel in their closing brief (p. 9) cite the case of *American Rotary Valve Co. v. Moorehead,* 226 Fed. 202, in support of their effort. That decision was upon a rehearing, and was delivered simply to cover the academic proposition that, under the liberal rule of the seventh circuit, a review may be had for an obvious mistake, which is not involved here, and even in that case the Court is careful to state that, as it believed nothing was involved in the appeal except questions of fact, it had affirmed the decree of the District Court without filing an opinion, and then proceeded to make the same disposition of the case on the rehearing, and not only in that case but in *Espenschied v. Baum* (cited in it), the Court goes on to point out the controlling opportunity of the trial judge to estimate the credibility of the witnesses and their appearance and demeanor on the stand, and, in each of these cases, the Court refused to reverse.

In view of counsel's ignoring the rule, and on account of the persistence in their manner of argument, we respectfully ask permission, in addition to the cases cited on this point in our opening brief (pp. 21-22), to cite to the Court two cases in the *ninth circuit,* in which the rule in this circuit has been stated:

> "The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends they are contrary to the

> weight of evidence. The trial Court made findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by credible testimony of reputable witnesses. Upon settled principles which this Court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

Butte & Superior Copper Co. v. Clark-Montana Realty Co., 248 Fed. 609, 616, per Gilbert, Circuit Judge (affirmed in 249 U. S. 12, 30).

> "The case having been tried without the intervention of a jury, the Court's findings are conclusive of the questions of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the Court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made."

Cook v. Robinson, 194 Fed. 753, 759 (before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge).

Appellant's Reply Brief Incorrectly States Record as to Loring's Position.

Perhaps one of the reasons of the rule just stated as to conflict of evidence may be found, too, in the undesirability of having counsel, particularly where the record is long or involved, attempt to discuss

the facts before a Court that has not heard the evidence, and, therefore, is not aided by its memory to check up or correct a misstatement of them.

Counsel state that the record discloses that in June, 1919, at the Belmont Hotel in New York Taylor told Loring that he intended to commence action to get the stock he claimed was due him under the contract from Friedman and the other defendants.

The record cited by counsel does not bear out this statement at all. Taylor testified that he telegraphed Mr. Loring asking him to meet him for a general discussion of the tungsten situation, *understanding there was a combination of the country's tungsten producers, and he (Taylor) wanted to secure a sales agency of that product;* that he understood Mr. Loring was the man to talk to; that he had told him his people had not made an agreement with the Friedman people. His testimony as to this portion of the conversation is most vague; that he does not know how much detail he went into; that "his people" had "a claim" against them, and hints that the probabilities were he would file some sort of a suit, just what he didn't know. *Not a word about commencing action to get stock alleged to be due him under any contract, or that he told him he had any such contract.* (Record, pp. 353, 354.)

Counsel then go on gaily to say that the record shows that Loring admits Taylor at that time gave

him notice of an intention to commence an action and to get the stock due him under the contract from Friedman and the other defendants (Appellant's Reply Brief, p. 2). Counsel make this statement right in the teeth of record being exactly the opposite (cross-examination of Loring):

> "Q. Did you at that time discuss with Mr. Taylor the Nevada Humboldt Tungsten Mines Company property?
>
> A. Casually, yes.
>
> Q. Did he not at that time inform you he was about to bring an action against the Nevada Humboldt and the defendants Friedman, Poole, Murrish and others here defendants, and did you not at that time say that you would keep your hands off the Nevada Humboldt?
>
> A. *I did not.*
>
> Q. You didn't have that conversation in substance and effect?
>
> A. *Not anything pertaining to it.*" (Record, p. 713.)

At that time Loring had never seen, or known the terms of Taylor's contract of April 2, 1919, upon which this suit has been brought, and never knew the terms of that contract before entering into his own contract of August 16, 1919. (Record, p. 715.) Loring was an operator producing a large amount of concentrates from the Pacific Tungsten properties in the immediate vicinity of the Friedman properties. (Record, p. 714, bot., and 715, top.) Taylor wanted to secure a sales agency of tungsten product, and what he discussed with Loring at the Hotel Belmont was money matters

pertaining to the sales on the market of tungsten. Knowing that Taylor was handling the product of the Nevada Humboldt mine under some sales contract and option on property (January), the property was only casually mentioned in connection with the discussion of the market sales of tungsten, and therefore when Taylor told him he was "going to take the mine away from the boys" or "away from Friedman," or something to that effect (Record, p. 714), he did not say anything about how he was going to do it, or go into that phase of it (Record, p. 716), and Loring did not, and could not, have any idea that the threat was in any way connected with any contract for stock. It is that sinister expression of wolfishness which is now attempted to be twisted into notice of intention to commence an action for specific performance. The expression is rather a corroboration of Taylor's scheming plan to "put the screws on them" through their creditors (Record, p. 525), and through bankrupt proceedings get possession of "a big cheap mine" by having himself appointed receiver! (Record, pp. 911-912.)

Counsel's statement with reference to the character of Loring's option at the time he received Taylor's telegram of August 10, 1919, is also incorrect and misleading. The record discloses the facts to be as follows:

On July 21, 1919, Mr. Loring entered into negotiations with certain stockholders of defendant cor-

porations looking to the purchase from said corporations of certain properties belonging to them. (Record, pp. 1111-1112.) On that day defendants L. A. Friedman, Poole, Jones, Hinch, Nenzel and Lena J. Friedman, instead of arranging for an option on the mining properties from the defendant corporations to Loring, *granted Mr. Loring an option on their stock* and that of their associates in the defendant corporations. (Record, p. 1110.) In like manner, on August 9, 1919, these same defendants agreed to a modification of the option they had granted him on July 21, 1919. (Record, pp. 1113-1114.) Then came Taylor's telegram of August 10, 1919, to Loring, stating that his attorneys considered he had a good cause for compelling present stockholders to assign to him control of stock of both companies *or as alternative* heavy damages, and stating that his actions would largely depend on what if any *interests* Loring might have as he did not want to involve him. (Record, p. 834.) Loring replied on August 11, 1919, that he held option on Nevada Humboldt interests. (Record, p. 835.) The option on Nevada Humboldt interests which Loring held on that date, August 11, 1919, and to which he referred, was plainly the aforesaid options on stock granted July 21st as modified by the letter of August 9, 1919. Five days after being advised by Loring that Loring held an option on the Nevada Humboldt interests, Taylor, on August 16, 1919, brought what he himself had termed his "alternative" suit

against the defendants other than Loring for "heavy damages," viz: $114,579.44. (Record, pp. 936-956.) On that day Taylor also filed suit for collection of his "claim" against defendant corporations for $9,179.44 as balance for money loaned to corporations which was secured by concentrates. (Record, p. 1117.) On that day, August 16, 1919, Mr. Loring did not exercise any option he held on stock, but, on the contrary, signed up an agreement of bargain and sale with the defendant mining corporations for the purchase of their mining properties (Record, pp. 991 et seq.), an agreement which contemplated a ratification by the stockholders at meetings to be held on August 23, 1919 (Record, pp. 1048 et seq.), and on which no money was to be due from Loring until September 1, 1919, when the first payment of $50,000 on account of the purchase price was to be made. (Record, p. 1023.) Learning that Taylor had brought his action at law (Record, p. 706), he caused the papers in the case to be examined for assurance, and long before either of said dates learned on August 19, 1919, that Taylor's suit was for damages only, and that Taylor in said suit laid no claims to any shares of stock. (Record, pp. 706, 707, 708, 715, 1116, 1117.) It may be noted in this connection, in passing, that while counsel, on page 3 of their Reply Brief cite Mr. Loring's answer on page 708 of the Record, they fail to cite his answers on page 715 of the Record which make correction of it. (Record, p. 715.) When Loring obtained the ratification by the stock-

holders on August 23, 1919, and made the payment which he was obligated to make on September 1, 1919, he had already been informed by Taylor that whether he would sue for specific performance or for heavy damages would depend upon what interest Loring might have in the matter and that he did not wish to involve Loring, and that after being informed by Loring's wire that Loring was interested, Taylor had actually filed his suit for damages and not for delivery of stock. (Record, p. 834.)

Loring has acted in entire good faith from beginning to end. After receiving Taylor's wire of August 10th, he did not exercise any option he held on the stock. He entered, instead, into a buy-and-sell agreement for the purchase of the mining properties from the companies, and on a scale that would leave them in a position to take care of all their creditors and even any possible damages; and he had Taylor's telegraphed assurance that he did not wish to involve Loring, and he knew before he obtained his ratification or paid any money that Taylor had elected to sue for damages only.

Counsel attempt to make the point that the notice of the stockholders' meeting of August 23, 1919, gave seven days' notice, and contends that this was in violation of Section 96 of the General Corporation Law of Nevada. (Statutes of Nevada, 1913, p. 65.)

The requirement of the Tungsten Company's By-laws of notice for holding special meetings of stock-

holders was at least *five days' notice* (Record, pp. 1101-1102), and seven days' notice was actually given by the secretary, and proof of the service made at the meeting and the affidavits of mailing same ordered filed with the secretary after being exhibited to the stockholders. (Record, p. 1048.)

In the first place, counsel are silent on the point that *Taylor was not a stockholder of the Products Company at all, and that the ratification of the Loring contract of August 16, 1919, by that company was made by the holders of every share of its entire capital stock.* (Record, p. 1034.) In the next place, *it was only of the Tungsten Company that Taylor was a stockholder, and even of that company was a holder of only 5,000 shares out of a million shares, and, as far as he was concerned, he did receive notice, for "by his attorney and proxy" he objected* to the meeting and to the ratification of the Loring agreement upon the ground that notice of the meeting was insufficient and that the sale was beyond the powers of the directors. (Record, pp. 848-849, 1049.) The record shows that no other stockholder of the Tungsten Company objected to the ratification.

The Nevada Statute, cited by counsel, we insist, was not intended to apply to sales of a corporation's assets when necessary to satisfy the claims of creditors.

The general rule prevailing in the United States is that a sale of all the property of a corporation,

which is a going concern, is *ultra vires* without the unanimous consent of all the stockholders, and at the same time, the rule is well recognized that where a corporation is insolvent or it is necessary to pay its debts, then such sale may be made without unanimous consent.

3 *Cook on Corporations* (7th Ed.), Sec. 670.

We submit that it was not the intent of the Nevada statute to change the rule in the latter regard; but it was intended to modify the general rule as to going concerns, so as to permit 60 per cent. of the stockholders to wind up a corporation in their discretion, and thus modify the rule prevailing generally elsewhere that unanimous consent is necessary.

The board of directors of a corporation, without ratification by the stockholders, has the right, if necessary, to sell all of its property for the purpose of paying its debts. See,

Beardstown Pearl Button Co. v. Oswald, 130 Ill. App. 290-294;

Lange v. Reservation Mining & Smelting Co., (Wash.), 93 Pac. 208;

Sewall v. East Cape Etc. Co., 50 N. J. Eq. 717; 25 Atl. 923.

As in the case of the *Reservation Mining & Smelting Co.,* supra, the By-laws of the Tungsten Company gave its Board of Directors the broadest powers, viz.:

"1st. * * *

"2d. To lease, purchase or otherwise acquire, *sell, assign or otherwise convey,* in any lawful manner for and in the name of the company, any of its real estate or other property, rights, privileges, whatsoever. deemed necessary or convenient and on such terms and conditions as they think fit, and at their discretion to pay or accept therefor, either wholly or in part, money, stock, bonds, debentures or other securities, either of this company or any other company." (Record, p. 1106.)

This authority on the part of the board of directors also exists if the corporation is insolvent. As plaintiff made oath on the 9th day of August, 1919, that the corporation was insolvent, he certainly cannot complain if the board of directors undertook even to sell all of its property at its meeting held on the 16th day of the same month. The minutes of the Directors' meetings of both companies plainly and explicitly recite the necessity of entering into the agreement of August 16, 1919, with Loring, because the companies "have become heavily indebted to various creditors and have not sufficient funds to meet the demands of said creditors." (Record, pp. 864, 1017.) But, assuming that a board of directors cannot sell all of its corporate property even for the purpose of paying its honest debts, nevertheless the fact is here that the corporation did not sell all of its property to Mr. Loring. It reserved and excepted certain articles of value of several hundreds of dollars. (Record, pp. 869, bot., 870, top; pp. 996, bot., 997, top; pp.

1022, 1083.) Such excepted property took the case out of the statute.

Shaw v. Hollister Land Etc. Co., 166 Cal. 257;
Bradford v. Sunset Land Co., 30 Cal. App. 87, 90.

No authority or ratification by the stockholders was, therefore, essential under the provisions of the Nevada Statute, relied on by plaintiff, and the cases cited by his counsel with reference thereto are not in point.

In addition to all this, Taylor is, of course, precluded by the ordinary rules of conscience and fair dealing from asserting against Loring his claim in a court of equity. The acceptance and use of Mr. Loring's money by the corporation is in itself a ratification of the sale to him, and it is estopped to dispute the sale where it has received and used or seeks to retain the proceeds, and it is a thoroughly well recognized rule that if a corporation is estopped from suing to set aside a transaction, then a stockholder is in the same position, the estoppel of the corporation, in other words, being binding upon each of its stockholders as pointed out in Appellee Loring's Opening Brief, pages 8 and 9.

Counsel claim that it cannot be said that Taylor was guilty of laches and yet the record shows that he was guilty of gross laches.

Taylor refrained from bringing his suit until after Mr. Loring had paid in enough money to pay

off all of the creditors of the corporation (including himself), and some $33,000 additional. Taylor told Mr. Loring in his telegram of August 10th that he, Taylor, had the alternative of suing for damages or for 62 per cent. of the stock. On August 16th he sued for damages and Loring received notice thereby which of the alternatives mentioned by Taylor he had taken. Taylor claimed damages, not the stock. Loring entered into his contract with the corporation, wherein he obligated himself to pay $333,333.33 and Taylor brought no action for 62 per cent. of the stock. On the contrary, his protest at the August 23rd meeting and his demand on the other stockholders to begin suit to set aside the conveyances confirmed the recognition as stockholders. Taylor waited. He did not even begin his action B-1, to set aside the conveyances on a technicality until after two payments of $50,000 had been paid into the corporation, *and that suit involved no suggestion of any suit for 62 per cent. of the stock. Taylor waited until all conditions with regard to the corporations, their future, and the property's future had changed. He waited until he had received from the corporation out of Loring's money the settlement of his own claim of over $7,341.04. He waited until after all the money to pay the creditors had been paid in and afterwards distributed to the creditors beyond recall in the payment of the companies' debts. He even states in his complaint in this action that he waited till there might be a change of condition through*

possible Congressional action. He has stood by for nearly a year, seeing Loring loyally making the payments he was compelled to make under his contract, on penalty of forfeiture, *of which the corporations and Taylor himself were the beneficiaries, and he made no claim until this suit was filed. April 17, 1920, that he was entitled to any stock.* The corporation, which he himself alleged under oath on August 9th, 1919, was insolvent, is clear of its enormous debt, and is now in funds. If ever there was a cause of gross laches, it is the case at bar.

See *Cook on Corporations* (6 Ed.), Sec. 733, and cases cited.

Six months is enough: 143 Fed. 483, *486;*
Eight weeks: 65 Atl. 730, *731;*
Three months: 99 Cal. 355;
Four months: 78 Cal. 389;
100 days: 10 Colo. 529.

The laches consist in his delay in asserting this present claim to 62 per cent. of the corporate stock. The fact that he claimed in another suit that Mr. Loring's contract and deeds were void merely for want of proper notice of the stockholders' meeting which ratified them, is, of course, no excuse for delaying to make the claim which is involved in the present action.

Counsel attempt to palliate the fact that when in settlement of his claim for $9,179.44 against the Tungsten Company, Taylor accepted the $7,334.04 out of funds he knew that Company had been paid

under its contract with Loring, he took it as a creditor and not as a stockholder. At a time after he had sworn on August 9, 1919, to the fact of the Company's insolvency, he knew that the only funds from which the check for $1,000 thereof which he received and personally endorsed (Record, p. 976) was the money it was receiving from Loring on the contract to which he was objecting. When he accepted the $6,334.04 thereof he also knew through his counsel that it was from the same source. (Record, p. 704.) To attempt to say now that because he accepted these pecuniary benefits as a creditor and not as a stockholder he accepted no "pecuniary benefit" is to mock the conscience of the chancellor. The decisions do not make any such absurd rule. The hands of such a stockholder will not be clean enough to come into a court of equity if he "has acquired and accepted pecuniary benefits" out of funds *provided through the agreement he is seeking to attack.* (See cases cited on pages 8 and 9 of Appellee Loring's Opening Brief.)

Failure of Appellant's Reply Brief to Show Evidence Misrepresentations Correspond to Allegations of Fraud Set Forth in His Pleadings.

Counsel for appellant have not said anything in the remainder of their brief as to alleged misrepresentations, etc., that have not been completely covered by the briefs for the other appellees, and that need any extended comment here. It would appear from the record that Taylor's whole contention as to misrepresentations by the other appellees and his alleged reliance upon them was a palpable after-thought. The record of proof fails utterly to dovetail with the frame-work of the complaint drawn on charges of fraud.

A. NO PROPER BASIS LAID FOR COMPARISON OF RESULTS OBTAINED BY PANNINGS AND THOSE OBTAINED BY BANCROFT.

The palpable unfairness of any attempt to show any essential conflict between Nenzel's telegrams and Bancroft's second report is manifest in the testimony in the record. No sufficient basis appears for the comparison counsel are now seeking to criticize in the Court's Opinion. The mere estimates that were put on the map by John Huntington were gotten by him from pannings in the mine at the points indicated, made by Morrin, the mine superintendent, and Taylor was told of that fact. (Record, p. 499.) Bancroft's method, on the other hand was to take samples across the entire width of the working in the event that the width did not

exceed six feet; in the event that width did exceed six feet, which he stated was true in a few instances, he took two sections, so he stated he believed he had no sample which was more than six feet wide. (Record, p. 254.) Then Mr. Bancroft himself, made a witness for the appellees in order to avoid the objection that the questions were not cross-examination, testified that there would be *no necessary approximation* between the results obtained by the two methods:

> "Q. In order to even approximate the method that you adopt in practice of cutting a trench and taking a spoil, it would be necessary to cut a similar trench and take a similar spoil, and place in what you would call the pan, would it not?
>
> "A. To approximate the same results, yes.
>
> "Q. So unless a man who was following the panning process cut trenches six feet on an average where the vein was wide enough, or less than six feet where the vein was not wide enough, there would be no necessary approximation between your result and the results which he would obtain, would there?
>
> "A. *I can go a little stronger than that; unless he cut his samples in approximately the same samples, in the same widths which I used, his results would not approximate.*
>
> "Q. That is exactly the proposition which I wish to bring out." (Record, pp. 258-259.)

With the handicap thus pointed out, it would be impossible to expect exact approximation. Under the circumstances, nothing closer could be expected than the approximation contained in the painstaking comparison in the opinion of the trial Court, which

demonstrates that there is no substantial conflict between the facts disclosed by Nenzel's two telegrams and Bancroft's report.

B. TONNAGE DEVELOPMENT NOT AN INDUCING CAUSE. TAYLOR WOULD HAVE ENTERED INTO APRIL 2nd CONTRACT WITHOUT ANY REPRESENTATION WHATEVER AS TO TONNAGE.

The record discloses that Taylor would have entered into the same contract of April 2, 1919, without any representation whatever as to tonnage. From February 24, 1919, to April 2, 1919, Taylor was desirous of entering into an arrangement along lines finally agreed upon on April 2, 1919. This he was willing to do upon the strength of Bancroft's first report without reference to the amount of increased tonnage actually developed.

While at one time he contemplated having Poole come to Denver, bringing data as to development work and assays, so that he and Bancroft could together work up a definite tonnage statement of ore developed, this was not for the purpose of giving him information upon which to frame a new contract. Any discussion as to tonnage came after Taylor was ready to enter into the contract upon substantially the terms that were finally agreed upon. It follows that no representation as to tonnage could have been an inducing cause for Taylor's consent to the contract.

This contention is demonstrated by three exhibits and a portion of Taylor's testimony, which follow:

Exhibit 1: (Record, pp. 779-780.) On reading this exhibit remember that Taylor had received Bancroft's report on February 20, 1919, showing about 8100 tons of ore developed. On February 24, with the knowledge of the then small tonnage, Taylor writes this exhibit, containing a new proposition, in which he says: "means that you would be willing to give me one-half interest in the mine" (the context shows he means stock) "for liquidating your present indebtedness." It is thus demonstrated that with the knowledge that there were about 8100 tons of ore developed in the mine Taylor was willing to enter into an arrangement whereunder he was to provide money for the payment of the debts for one-half of the stock of the company.

Exhibit 12: (Record, pp. 797-800.): Taylor writes to Friedman March 25th, urging Friedman to come to Denver. He says:

> "Bancroft * * * will not return to Denver until April 1. * * * In order to work in with Bancroft's proposition, I suggest that Poole come to Denver during the first week in April, bringing exact data as to development work, assays, etc., so that he and Bancroft together can work up a definite tonnage statement of the present ore development. * * * If you cannot come, would your stockholders be willing to have Nenzel, Poole and Murrish appointed as a joint committee to represent them in readjusting the option. * * * The general basis of readjustment which I have in mind is some basis on which cash be furnished for the liquidation for all of the company's indebtedness plus my ability to acquire the stock

> or 75 per cent of it on a basis of paying for the stock out of the future earnings."

It is thus demonstrated that, without any knowledge of actual ore development, Taylor was proposing to enter into an arrangement whereby he would take 75 per cent. of the stock for obtaining the funds with which to pay off the debts. If it be argued that this suggestion was conditioned upon the tonnage which Poole and Bancroft were to work up together, the next exhibit will show that this was not the fact.

Exhibit 52 (Record, p. 891) (Note that on March 28, 1919, Nenzel had wired Taylor that Murrish, Poole and himself would leave the following day, arriving in Denver Sunday next. Exhibit 14):

On March 28 Taylor wired the Nevada Humboldt Tungsten Mines Company from Denver:

> "Bancroft plans changed. * * * He may or may not come back via Denver. *However, do not believe his presence necessary* for proposed conference. Would be glad to see Messrs. Poole, Murrish and Nenzel."

This shows that Taylor was ready to enter into a contract without having Poole and Bancroft together to work up a tonnage statement.

Note the significant fact that now that Taylor has abandoned the idea of having Poole and Bancroft together to work up a tonnage statement, he makes no further suggestion in this telegram that Mur-

rish, Poole and Nenzel are nevertheless to bring on the data, which, according to his letter of March 25th, was to have been only for Bancroft's use.

Now, this brings us to Taylor's own testimony as to his state of mind when he first met these parties in Denver on Sunday. *Was Taylor on that day, and prior to any alleged representations as to tonnage, ready to enter into the contract upon substantially the terms that were ultimately agreed upon?*

> "Q. Was anything said on that Sunday with regard to the quantity of ore in the mine?
> "A. I can't tell you exactly, except the condition of the mine looked very good.
> "Q. And that is all that you recall was said on that Sunday?
> "A. I don't recall particularly what was said on that day.
> "Q. Can you give us the substance of what you said as to what you were willing to do on that Sunday?
> "A. *I was willing in a general way at that time to make a contract according to the terms that were finally arranged.*
> "Q. Did you say that?
> "A. I don't remember whether I did or not."
>
> (Record, pp. 117, 118.)

We submit that from the foregoing exhibits and testimony the conclusion follows that no representation as to tonnage was an inducing cause for entering into the contract of April 2nd. Certainly, the testimony that it was an inducing cause is too vague and uncertain to justify a conclusion that

representations as to tonnage were an inducing cause.

In re Hawks, 204 Fed. 314, 316;
United States v. Southern Pacific Co., 260 Fed. 511, 520.

The state of mind under which he entered into the agreement of April 2d at Denver was not induced by any representations as to tonnage made there. As soon as he had obtained his contract, however, he immediately wired Bancroft, showing he intended always to rely on him in the expenditure of any money under it. The evidence of how completely he carried out this plan, not expending more than about $250 without it, is completely covered by the briefs in behalf of the other appellees, and need not be reviewed by us.

Appellant has Plain, Speedy and Adequate Remedy in the Ordinary Course of Law.

There is no attempt in appellant's reply brief, nor was any attempt made at the trial, to introduce evidence to show that plaintiff has not a plain, speedy and adequate remedy in the ordinary course of law. He has actually gone to law as the record in No. 2263 shows. He has there stated under oath what his alleged damages are. His counsel have cited a great many authorities upon the measure of damages in such cases. He relies strongly upon the case of *Dotson v. Milliken*, 209 U. S. 237; 52 L. Ed.

768, a case which shows that the measure of damages in such cases is the amount of value of that which the broker was to receive for his services.

While Taylor's complaint in the present action alleges that the stock is of uncertain value, it is denied by Loring and Taylor has offered no proofs. There is no evidence in the record to support the allegation. There is, moreover, uncontradicted evidence in this case that Mr. Loring's contract is being fulfilled, and *it is obvious therefore that the value of the shares of stock can be readily ascertained.*

There is no pretense that there is anything wrong or fraudulent about Mr. Loring's contract. Mr. Loring agreed to give $333,333.33 for the property on the very day that David Taylor filed a complaint in which he had sworn that the corporation was insolvent; that its debts exceeded the value of its assets by about $100,000. And it therefore appears that the price paid was not only an adequate one under the circumstances, but placed in the treasury of the corporation a surplus of about $133,333.33, making the value of the shares of stock of the corporation a matter of easy and definite computation. See particularly

Ellis v. Treat, 236 Fed. 124,

a case on appeal in this Ninth Circuit.

Taylor's Demand Is Unconscionable and Equity Will Never Enforce an Unconscionable Demand.

With reference to appellant's closing suggestion concerning the jurisdiction of a court of equity in his reply brief, it is sufficient to say that if all that Taylor claims is true, the evidence shows that he devoted a few days' time and expended less than $250 on the faith of his contract before he determined to act upon the advice of an independent investigator. He certainly did not spend a day or a dollar after he talked with Mr. Thane on the train, upon the faith of Poole's alleged representations. He determined to have an independent investigation of the property made before he would advance any money on the deal. Without his own advances, it cannot even be pretended that he was ever in a position or able to perform the contract. For this trifling outlay of time and money which he claims to have made upon the faith of Poole's alleged representations, he would have this Court place him in possession of 62 per cent. of the stock of these corporations.

Nothing of value or benefit ever came to the corporations, or their stockholders, through Taylor's efforts under his contract of April 2, 1919. They have not benefited to the extent of a single dollar by anything that Taylor did or expended under that contract.

Taylor has made his business profit out of the corporation under his sales contract of January,

1919, and months before this suit was brought had been paid every dollar of any balance owed him under that contract. (When on March 10, they had sorely needed $15,000 and asked accommodation of sight draft as against carload of concentrates about to be shipped (Record, p. 789), he refused it.)

Mr. Loring's purchase has not only paid off all the debts of the corporations, but leaves available assets in their hands amounting to $133,333.33, 62 per cent. of that net amount is $82,666.66. This would be an unconscionable return to Taylor for any services rendered by him or any outlays made by him upon the faith of Poole's alleged representations.

In some jurisdictions it is held that mere inadequacy of consideration will not defeat specific performance of a contract. But such is not the universal rule. It is not the rule in California, nor is it the rule in the United States Courts. On the contrary, the rule prevailing in the United States Courts is that where the consideration is so grossly disproportionate as to make the bargain unconscionable, equity will refuse aid.

> "The purchaser, Cromwell, stands in no better position. He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of $30,000 worth of stock for which he paid only $50. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the plaintiff to his

> remedy at law. This has so often been held on bills for specific performance, and in other analogous cases, that it is unnecessary to spend argument on the subject."
>
> *Miss. & M. R. R. Co. v. Cromwell,* 91 U. S. 643, 645.

The case of *Camp v. Boyd,* cited by appellant, is not in point either on its facts found or on the situation presented by the record. The case at bar is not an appeal from a decision of a Court of equity which is assuming that relief is due the complainant on the merits and where the only question is how the relief shall be given. On the contrary, the appeal in the case at bar is from the decision of a Court of equity which has found from the evidence heard in open court that the complainant's allegations of fraud, misrepresentation and reliance thereon are without merit, and that he is not entitled to any relief because he has no case on the merits.

We respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco,
November 30, 1923.

Respectfully submitted,
JOHN F. DAVIS,
CHARLES S. WHEELER, JR.,
Attorneys for Appellee W. J. Loring.

No. 3902

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID TAYLOR,

Appellant,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES COMPANY (a corporation), TUNGSTEN PRODUCTS COMPANY (a corporation), MILL CITY DEVELOPMENT COMPANY (a corporation), W. J. LORING, C. W. POOLE, R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN, C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A. TWIGG, J. C. HUNTINGTON and LENA J. FRIEDMAN, individually,

Appellees.

BRIEF FOR APPELLEE W. J. LORING.

JOHN F. DAVIS,
CHARLES S. WHEELER,
CHARLES S. WHEELER, JR.,
Attorneys for Appellee Loring.

FILED

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Appellees.

BRIEF FOR APPELLEE W. J. LORING.

Statement of Facts.

W. J. Loring is not charged with any wrongdoing whatever, and yet he is the respondent whose financial interests are more deeply affected by this litigation than are those of any other defendant.

The record establishes the following facts:

On July 21, 1919, Mr. Loring entered into negotiations with certain stockholders of defendant corporations looking to the purchase from said corporations of certain properties belonging to them (Record, pp. 700, 701, 1111-13).

On said date a so-called "option" was given to Loring by said stockholders for the purchase of properties belonging to the said corporations, and on August 9, 1919, a modification of this "option" was signed (Record, pp. 1114, 1115).

On August 10, 1919, plaintiff Taylor wired defendant Loring as follows:

> "Reno newspaper reports dispatch from Imlay stating you have bought Friedman tungsten interests in Mill City district. Would appreciate your wiring early Monday as to what if any Nevada Humboldt interests you have bought. The companies and stockholders owe me considerable money and my attorneys consider I have good case for compelling present stockholders assign to me control of stock of both companies or as alternative heavy damages. My action will largely depend on what if any interest you may have as I don't want involve you in this mess" (Record, p. 834).

On August 11, 1919, Loring replied as follows:

> "I hold option on Nevada Humboldt interests" (Record, p. 835).

It will be noted that Taylor in his wire had said (italics ours):

> "* * * My attorneys consider I have good case for compelling present stockholders

> assign to me control of stock of both companies *or as alternative* heavy damages. My actions will largely depend on what if any interests you may have as I don't want involve you in this mess" (Record, p. 834).

Five days after being advised by Loring that Loring held an option on the Nevada Tungsten interests, Taylor, on August 16, 1919, brought what he himself had termed an "alternative" suit against the defendants other than Loring for "heavy damages", viz.: $114,579.44 (Record, pp. 936-956).

Taylor's charges, for which he thus asks damages, are substantially identical with the charges in the bill here. It thus appears that now he is suing not on one but on both of his "alternatives". It will be noted that he did not file the bill in the case at bar until over eight months after he had brought his said action at law (Record, p. 1165).

On August 16, 1919—the same day on which Taylor filed his complaint at law for damages—respondent Loring signed an agreement for the purchase of the mining properties of the defendant corporations (Record, pp. 991 et seq.). This agreement contemplated a ratification by the stockholders of said corporation at meetings to be held on August 23, 1919 (Record, p. 1048 et seq.). No money was to be due from Loring until September 1, 1919, when the first payment of $50,000.00 on account of the purchase price was to be made (Record, p. 1023). Loring learned that Taylor had

brought his action at law. He caused the papers in the case to be examined by his counsel, and on August 19, 1919, learned that Taylor's suit was for damages only and that Taylor in said suit laid no claims to any shares of stock (Record, pp. 706, 707, 708, 1116, 1117).

In this connection it should be remembered that Taylor's wire to Loring of August 10, 1919, had said in substance that whether he (Taylor) would sue for specific performance or for heavy damages would depend upon what interest Loring might have in the matter and that he did not wish to involve Loring; and that after being informed by Loring's wire that Loring was interested, Taylor had actually filed suit for damages (Record, p. 834).

On August 23, 1919, at a meeting of stockholders of Nevada-Humboldt Tungsten Mines Company, more than ninety-four per cent. of the total issued stock was present and voted to ratify the Loring agreement (Record, pp. 1048-1054).

Appellant Taylor owned 5000 shares of stock in said corporation. He was notified that the meeting would be held and by "his attorney and proxy" objected at the meeting to the ratification of the Loring agreement upon the ground that notice of the meeting was insufficient and that the sale was beyond the powers of the directors (Record, pp. 848-849, 1049, bottom).

It is to be noted that Taylor's written protest which is dated August 22, 1919, is based on his ownership of 5000 shares of stock and contains no claim whatever that Taylor is equitably entitled to sixty-two per cent. of the stock of the corporation. Moreover, his notice is addressed to the defendants from whom he now claims this stock "as stockholders" (Record, p. 848). After the vote of the stockholders ratifying the transaction with Loring, deeds were executed to Loring on August 23, 1919 (Record, pp. 1070-1087).

On September 1, 1919, Loring paid $50,000.00 on account of the purchase price of the properties.

On October 1, 1919, a second payment of $50,000.00 was made by Loring.

On November 15, 1919, he made a third payment of $50,000.00.

On December 27, 1919, he made a fourth payment of $50,000.00, and on February 4, 1920, he paid the further sum of $33,333.33.

The appellant knew all about these payments and he waited until after a total of $233,333.33 had been paid to the defendant corporation by Loring before he brought this suit. The complaint here was filed on April 17, 1920 (Record, pp. 1125-1165).

Not only this, but Taylor knew that the moneys so paid in by Loring were being used to pay off the debts of the defendant corporations (Record, pp. 734-740).

Knowledge of his attorney was knowledge of Taylor.

4 *Cyc.* 933, 934;
Rogers v. Palmer, 12 Otto, 102 U. S. at p. 268;
Wormser v. Metropolitan Street Ry. Co., 184 N. Y. at pp. 87, 88, 91;
Thompson v. Angel, 13 N. Y. Supp. at p. 93;
3 *Cook on Corporations* (6th ed.), Sec. 730.

But even that is not the worst of Taylor's conduct. He was, himself, one of the creditors of the defendant Nevada Humboldt Tungsten Mines Company to the amount of $9000 (Record, pp. 681, 682), and he accepted payment of his claim for this money, knowing that Loring had paid it in on account of the purchase price under his contract (Record, pp. 734-740). Taylor now stands before this Court with Loring's money jingling in his pockets and asks this Court of conscience to prevent the corporations defendant from perfecting Loring's titles to the lands for which Loring has paid in full (Record, pp. 1145, 1146). Taylor tells the Court in his bill of complaint that he has brought another suit to set aside Loring's deeds and contract (Record, p. 1139), and in this present action he is asking the aid of the Chancellor to help him consummate that result (Record, pp. 1139-1142).

I.

APPELLANT'S DEMAND AGAINST LORING IS UTTERLY UNCONSCIONABLE.

Three weeks before respondent Loring paid over any portion of the purchase price under his contract, appellant Taylor had wired him that he was advised that he, Taylor, had a cause of action against the defendant stockholders either for specific performance to compel them to deliver stock to him or "*as an alternative* heavy damages". He further said in substance that he did not want to involve Loring and that his actions with regard to the kind of suit he would bring—whether to gain possession of the control of the stock in defendant corporations or for heavy damages—would largely depend on what, if any, interest Loring had (Record, p. 834). He was promptly informed by Loring that Loring held an option on the properties. Six days later he brought his suit against said stockholders for heavy damages, viz.: $114,719.44, for their alleged failure to comply with their contract to deliver said stock to him. That suit is still pending. Knowing that after he had filed that suit at law, Loring had entered into his contract to purchase the properties belonging to defendant corporations, Taylor kept silent for about eight months, and then he brought this suit seeking to upset the arrangement with Loring; but he did not bring it until all of the indebtedness of the defendant corporations had been paid off with the money received by them from Loring under the contract

of purchase and sale, and not until Taylor had knowingly accepted more than $7000.00 in satisfaction of his creditor's claim against one of the defendant corporations. And he did this, knowing that Loring had paid in that money to the corporations on account of the sale which Taylor is here asking this Court to help him repudiate. The defendant corporations are now freed from $200,000.00 of debt, thanks to Loring's money, and they have a substantial surplus in their treasuries, all the result of the cash received from Loring. In the face of these facts, Taylor has the audacity to to ask this Court of Conscience to award him sixty-two per cent. of the corporate stock in order that he may defeat the titles for which Loring has paid over the money. And Taylor's conscience does not even prick him hard enough to lead him to offer to restore a single dollar to Loring.

Of course, Taylor is precluded by the ordinary rules of conscience and fair dealing from asserting against Loring his claim in a court of equity. If the corporations were themselves seeking to repudiate the contracts with Loring, or to cancel his deed, they would be told that they could not take and keep Loring's money and make no offer to restore it to him and have any relief in this Court.

Beach v. Miller, 130 Ill. 162, at p. 174;

Union Pac. R. R. Co. v. Chicago, 57 Fed. 309-326;

Bennelac v. Richards, 125 Cal. 427;

Butler, etc. Co. v. Cleveland, 220 Ill. 128.

And it is Hornbook law that in such a case a stockholder is in exactly the same position.

Kessler v. Emsley Co., 141 Fed. at p. 134;

And same case on appeal in this circuit:

148 Fed. at p. 1019;

3 *Cook on Corporations,* 7th Ed. Sec. 744.

And it is also in obvious accord with principles of equity that a stockholder who has knowingly shared in the moneys received by a corporation from a sale of its property cannot upon the ground that he is a stockholder repudiate the transaction which has brought the money into the corporation.

> "Where the objection to the acts of a corporation is that they are *ultra vires,* without being either *mala prohibita* or *mala in se,* a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder. Whether his conduct in so doing constitutes an estoppel in the strict sense of that term or a *quasi*-estoppel, as Mr. Bigelow puts it (Bigelow on Estoppel, 4th ed., chap. XIX) or be denominated merely an acquiescense or an election, or the assumption of a position inconsistent with an attack, makes no essential difference here."

Wormser v. Metropolitan Street Ry. Co.,
184 N. Y. at pp. 87, 88 and 91.

II.

IN THE DECREE THE COURT FINDS THAT APPELLANT NEVER PERFORMED, OR OFFERED TO PERFORM, THE CONTRACT WHICH HE SEEKS TO HAVE SPECIFICALLY ENFORCED ALSO THAT HE WAS NEVER AT ANY TIME READY, ABLE AND WILLING TO PERFORM IT. THESE FINDINGS ARE NOT ATTACKED BY ANY ASSIGNMENT OF ERROR AND THEY ARE FATAL TO THE APPELLANT ON THIS APPEAL.

The agreement which appellant asks this Court to enforce contains the following provision:

> "E. It Is Further Mutually Covenanted and Agreed that this agreement shall expire by limitation on June 16, 1919, and shall carry with it the option hereinbefore mentioned as executed on January 16, 1919, which shall also expire by limitation on said date, and they shall be of no further force or effect if the first party shall not have negotiated the loan and secured the money provided in Paragraph 1 hereof.
>
> "Time is the essence of this agreement" (Record, p. 1164).

The decree, among other matters, finds the following facts:

> "* * * said plaintiff never performed, or offered to perform, the covenants and agreements upon his part to be performed under the terms of said contract of April 2, 1919, and that he was never at any time, ready, able and willing to perform the said covenants and agreements of said contract" (Record, p. 1438).

There is no assignment of error directed to the foregoing findings. This Court has repeatedly de-

clared that in equity cases it will not review recitals of fact found in the opinion of the trial Court.

McFarland v. Golling, 76 Fed. at p. 24;
Russell v. Kern, 69 Fed. 94;
Caverly v. Deere, 66 Fed. 308.

Were it otherwise, the result in this case would not be changed, for the recitals which we have quoted from the decree are in complete harmony with those on the same subject found in the opinion of the Court. The opinion—referring to June 16, 1919—the date when the contract sued on was to expire by limitation—says:

> "Prior to that date no deposit in the Wells Fargo Nevada National Bank of San Francisco of an amount sufficient to liquidate the indebtedness of the defendant corporations was made by or for Taylor. He never performed what he agreed in the contract to do; he never made an unconditional offer of performance, and never prior to June 16th was he actually ready, able and willing to perform unconditionally" (Record, pp. 1435, 1436).

There is nothing whatever in any of the assignments of error which attacks the foregoing recitals either as they appear in the opinion or in the decree.

The rule laid down by this Court and universally followed is embodied in the following quotation:

> "We decline to discuss this question, for several reasons: * * * There is no assignment of error which presents this point for the consideration of this court, and there is no 'plain error not assigned' which would author-

> ize this court to notice it. (Rule 11 of this court, 32 C. C. A. lxxxviii.) The necessity of having assignments of error filed before the appeal is taken, in order to authorize the examination of any question, is fully and clearly stated by this court in *Lloyd v. Chapman,* 35 C. C. A., 474, 93 Fed. 599."
>
> *Savings & Loan Soc. v. Davidson,* 97 Fed. at p. 702.

The case in the particular under discussion is obviously one which presents no "plain error not assigned", and we have only to consider, therefore, the legal effect upon respondent's case of the facts thus conclusively established in the decree.

Probably no rule in equity is more firmly settled than that which holds it essential that when time is of the essence of a contract the party seeking specific performance must, within the time limited, have performed or have offered to perform the obligations imposed upon him by the contract. And if he has only offered to perform, he must in fact at the time of such offer have been ready, able and willing to perform.

> *Bernier v. Griscom-Spencer Co.,* 161 Fed. 438 at p. 441.
>
> "It is perfectly obvious, we think, from an inspection of this record, that the complainants at no time tendered to the defendant the sum of $60,000 at the National Bank of North America in the city of Boston or elsewhere, or ever professed a willingness to pay him that sum until he had deposited the entire capital stock of the water-supply company in the Bos-

ton bank aforesaid, which deposit of stock, as the complainants well knew, the defendant was not prepared to make. Under these circumstances we must conclude, as the circuit court appears to have done, that the complainants were not entitled to specific performance of the contract, for the reason that they never placed the defendant in default by tendering to him the sum which he was clearly entitled to receive before the delivery of any stock."

Wescott et al. v. Mulvane, 58 Fed. 305, at p. 308;

Kelsey v. Crowther, 162 U. S. at pp. 408, 409;

Pomeroy's Specific Performance of Contracts, 2 Ed., Sec. 323, p. 399.

III.

THE ATTEMPTED ASSIGNMENTS OF ERROR ARE ONE AND ALL FATALLY INSUFFICIENT.

In this case it is very certain that there are no plain errors on the face of the record such as would move the Court to notice them of its own motion, even though not attacked by any assignment of error. The attempted assignments of error are nine in number (Record, pp. 1469-1472). Three of these,—viz.: those numbered I, II and VIII,—are merely general assertions that the Court erred in making its final decree, or that said decree is not supported by the evidence, or that it is contrary to the evidence, or that it is against law, or that the

Court erred in overruling and denying plaintiff's petition for a rehearing.

It is a very familiar rule that such assignments as Nos. I, II and VIII are too general to be noticed and will be disregarded by this Court.

Doe v. Waterloo Mining Company, 70 Fed. 461;

U. S. v. Ferguson, 78 Fed. 103;

Hart v. Bowen, 86 Fed. 877, 882;

Florida Central etc. Co. v. Cutting, 68 Fed. 587.

The remaining assignments, viz.: Nos. III, IV, V, VI, VII and IX, are not only amenable to the objection just urged against the other three assignments,—i. e., that they are too general—but they are not addressed to the decree of the Court at all. They are mere attacks upon the opinion which was filed in the case (Record, pp. 1470-1471).

The rule in such cases is as follows (italics ours):

"The assignment of errors is objected to as 'uncertain, insufficient, and not a compliance with the rules of the court'. It contains numerous specifications which need not be considered, *because they are aimed at the opinion of the court, and not at the decree rendered. Caverly v. Deere,* 13 C. C. A. 452, 66 Fed. 305, and 24 U. S. App. 617; *Russell v. Kern,* 16 C. C. A. 154, 69 Fed. 94, and 34 U. S. App. 90; *Davis v. Packard,* 6 Pet. 41, 48."

McFarlane v. Golling, et al., 76 Fed. 23, at p. 24.

The ultimate facts upon which the decree rests are fully recited in the decree itself (Record, pp. 1437-1438), and as to the matters thus set forth in the decree no error is assigned.

It will be noticed that assignments Nos. III and IV are addressed to that portion of the *opinion* which appears in the record at pp. 1423-1428. The fact that assignments III and IV are directed against the recitals of the opinion is also stated by opposing counsel on page 21 of appellant's opening brief.

Assignment No. V is directed against a statement of the Court appearing in said *opinion* at p. 1423 of the record; while assignment No. VI attempts to attack a passage which is quoted in *haec verba* from the *opinion* (Record, p. 1435). See also appellant's opening brief, p. 36, where it is stated that assignments V and VI are addressed to the opinion.

Assignment No. VII is avowedly addressed to the *opinion*.

Assignment No. IX is directed to a portion of the *opinion* appearing on page 1435 of the record.

The foregoing review covers all of the assignments which the appellant filed with his petition on appeal.

Under the authorities noted (and there are, of course, many others of like tenor among the Federal decisions) the assignments of error cannot be

considered, and there is nothing whatever, either in the facts or the law, for this Court to review.

IV.

THE CHARGES OF FRAUD ARE UTTERLY WITHOUT MERIT.

Since the demand for relief against respondent Loring is based upon the charges of fraud which although not made against him are made against the other defendants, we shall examine them briefly. We shall assume—contrary to the fact and for purposes of argument merely—that there are assignments of error sufficient to justify this Court in inquiring into the trial Court's findings on the question of fraud.

In its decree the trial Court finds as follows:

> "That the defendants did not, nor did any or either of them, either acting for themselves or for any other person or persons, or otherwise, make to the plaintiff at any time any false and fraudulent, or false or fraudulent, representations whatsoever.
>
> "It is not true that the plaintiff was induced to enter into the contract of April 2, 1919, a copy of which is attached to plaintiff's complaint, marked Exhibit 'C', or to perform its conditions, or any or either of them, by reason of any false and fraudulent, or false or fraudulent representation or representations whatsoever" (Record, pp. 1437-1438).

The authorities often refer to the strength and character of the evidence which the courts deem

necessary to sustain a charge of fraud. They all agree that

> "To establish fraud, the proof must be clear, unequivocal and convincing."
>
> *In re Hawks,* 204 Fed. 309, 316.
>
> "The presumption is always against fraud—a presumption approximating in strength to that of innocence of crime."
>
> *United States v. Southern Pacific Company,* 260 Fed. 520 (Ninth Circuit);
>
> *Truett v. Onderdonk,* 120 Cal. 581, 588, per Judge Van Fleet (now of this circuit) when upon the Supreme Bench of California.

In the face of the foreging rules, it is nothing short of ridiculous to claim that plaintiff has established the charges of fraud set forth in his bill.

(a) *The first charge of fraud:*

This charge is that four persons,—Poole, Murrish, Nenzel and Friedman,—*by means of telegrams and letters*—falsely represented that new development work "had developed and placed in sight, blocked out and made ready for mining, large quantities of scheelite ore of commercial value and capable of being concentrated and concentrates so returned being of great value" (Record, p. 1423).

The evidence shows that while Nenzel sent a number of telegrams and letters to the plaintiff, neither Poole, nor Murrish, sent any letter or telegram to him, nor is there any evidence whatever that either of them or Friedman ever saw or knew

the contents of the letters and telegrams sent by Nenzel. Friedman sent a wire to the plaintiff on March 25, 1919, which reads as follows:

> "Suggest that you and Bancroft come here some time this week. All stockholders are here now and am sure you will find mine development fulfill your most sanguine expectations and am confident that we will arrive at some modified arrangement as suggested in your correspondence" (Record, p. 796).

Bancroft was the plaintiff's mining expert. An invitation to the plaintiff, such as is contained in the foregoing telegram, to come and bring his expert and examine a mine, would be strange evidence upon which to base a finding of false and fraudulent representations as to the ore in sight in that mine. This leaves only Nenzel's telegrams and letters to be considered. Nenzel wrote or wired to plaintiff at intervals between February 15, 1919, and March 27, 1919. Two months later, after the last of these letters or telegrams was written, Bancroft on May 24, 1919, for a second time examined the property, took some samples and had them assayed. These assays, as the Court found, corroborate substantially the statements made by Nenzel in his letters and telegrams to Taylor, but the mere fact that the assays so taken by Bancroft do not agree exactly in all particulars with those referred to by Nenzel is relied upon by the appellant as proving that Nenzel's statements were wilfully false and fraudulent. There is no evidence that the ore, assayed by Bancroft, was taken

in the identical places, or in the same manner, or in the same quantity as the samples from which the Nenzel assays resulted. Moreover, the Bancroft assays were fire assays, while these made at the mine were "pan assays" and Taylor was so informed. Work had been going on in the mine for over two months after Nenzel's last letter was written. Anyone who knows anything about mine assays realizes that they will differ greatly in a small area, however carefully and honestly taken. To brand a man as guilty of wilful fraud upon so flimsy a showing as is here presented would be to perpetrate a gross wrong. The Court very properly found that no such fraud had been committed, saying not only what we have quoted *supra* from the final decree, but also in its opinion:

> "In view of this correspondence and Bancroft's second report, it is impossible to find that the letters and telegrams in evidence from defendant to Taylor prior to April 2, 1919, contained fraudulent misstatements, or that by anything in such letters and telegrams Taylor was misled" (Record, p. 1428).

Complaint is made in appellant's opening brief that one of Nenzel's representations was that a vein fifteen feet wide had been opened up in a certain place, and that this statement was untrue.

The evidence relied on to prove it untrue is a so-called plate, No. 5A, attached to Bancroft's supplemental report (Appellant's Opening Brief, pp. 26, 29).

But Bancroft does not attempt to say that the said plate shows the width of the vein at every point (see Bancroft's testimony, Record, pp. 240, 242).

All that Bancroft's plate shows could have been absolutely true without in any degree contradicting Nenzel.

(b) *The second charge of misrepresentation:*

The gist of this charge is that Poole, Nenzel and Murrish at Denver on April 2, 1919, falsely and fraudulently represented to Taylor that there was then "blocked out, in sight and ready for mining and reduction into concentrates 60,000 tons of scheelite ore, which would carry an average of 1.75 per cent. tungstic acid" (Record, p. 1133).

In his written opinion the trial Judge said:

> "The evidence is not sufficient to show that the alleged false representations as to tonnage in the mine were made" (Record, p. 1435).

In its decree the Court found:

> "That the defendants did not, either acting for themselves or for any other person or persons, make to the plaintiff at any time any false and fraudulent, or false or fraudulent, representations whatever" (Record, p. 1437).

The plaintiff Taylor testified that the representations as to tonnage and tungstic acid contents were made to him by Poole in the presence of Nenzel and Murrish (Record, p. 56).

Poole, Nenzel and Murrish flatly and unequivocally deny that such representations were made (Record, pp. 471, 616 and 649).

Appellant's counsel fully recognize the fact that the evidence is conflicting. In their opening brief they say, at page 50:

> "There is, however, a sharp conflict in the testimony as to whether any representations as to tonnage or percentages were made."

While admitting this conflict, appellant's counsel, nevertheless, in the face of the well-established rule of this Court regarding the conclusions of a Chancellor on conflicting evidence where the Chancellor has had an opportunity to see and observe the witnesses, asks this Court to pass upon the credibility of these same witnesses and to reverse the trial Court upon the facts.

This Court has always declined to interfere in such cases with the findings of the trial Court.

> "Another equally well established rule of law is that, while the findings of the chancellor in an equity case on conflicting evidence, have not the conclusive effect given to the verdict of a jury or of the trial judge when a jury has been waived, they are entitled to high consideration, and *unless clearly against the weight of the evidence,* or induced by an erroneous view of the law, they will not be disturbed by the appellate court, and this applies with greater force when practically all the testimony was taken in open court, *affording the trial judge the opportunity to note the de-*

meanor of the witnesses for the purpose of determining their credibility, which the appellate court hearing the case on a printed record, has not" (italics ours).

Unkle v. Wills, 281 Fed. at p. 36, and cases cited.

"It is the settled rule of procedure that where the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding it must be treated as unassailable'. *Adamson v. Gilliland,* 242 U. S. 350, 353, 37 Sup. Ct. 169, 170 (61 L. Ed. 356)."

Snow v. Snow, 270 Fed. at pp. 366, 367.

"It was tried in open court, with full opportunity in the trial justice to observe the demeanor of witnesses and to judge of their veracity. In such cases the finding of the trial justice on questions of fact has much the same sanctity as the verdict of a jury, and will not be disturbed on appeal unless a mistake of judgment is so apparent as to demand a reversal."

McLarren v. McLarren, 45 App. D. C. 237, 238.

See also:

Benedict v. Setters, 261 Fed. at p. 503;

Porto Rico Mining Co. v. Conklin, 271 Fed. at p. 577;

United States v. Delatour, 275 Fed. at p. 138;

Board Improvement District No. 2 v. Missouri Pacific R. Co., 275 Fed. at p. 603.

In the case at bar there can be no occasion whatever to doubt the correctness of the Chancellor's conclusions upon the facts. This Court is asked to disregard the testimony of three witnesses and to accept in its place the testimony of the plaintiff.

The untrustworthiness of the plaintiff is sufficiently evidenced by the following answer which he made when confronted with one of the letters which he himself had written to one of the defendants:

> "Q. Calling your attention * * * to the following phrase: 'Nobody in the East wanted to tackle the proposition unless they had control and we were unwilling to give that up.' Do you recall making that statement?
> "A. I do not particularly recall it, but if it is in the letter I made it.
> "Q. Was that true or false?
> "A. I don't know, sir" (Record, p. 181).

It is the testimony of the man who gave that answer which this Court is asked to accept in the face of the testimony of three witnesses who flatly contradicted him and in the face of the trial Court's conclusions.

The trial Court's estimate of Taylor's credibility is abundantly shown throughout its written opinion. When it is remembered that Taylor had repeatedly sworn that he was misled and deceived, the following excerpt from the opinion sufficiently illustrates the impression which he made on the trial Judge:

> "In my judgment Taylor was neither misled nor deceived by the defendants. He was fol-

> lowing consistently an original plan to secure the property for the smallest possible outlay of money on his part'' (Record, p. 1435).

There is certainly no obvious mistake of fact in the conclusions of the trial Court, nor has the appellant pointed out any error whatever in the application of the law to the facts as found by the Chancellor.

There is, therefore, no occasion whatever, to take this case out of the general rule so firmly established in the United States Circuit Court of Appeals and noted in the authorities referred to *supra.*

Dated, San Francisco,
May 7, 1923.

Respectfully submitted,

JOHN F. DAVIS,
CHARLES S. WHEELER,
CHARLES S. WHEELER, JR.,
Attorneys for Appellee Loring.

No. 3902

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

DAVID TAYLOR,

Appellant,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES COMPANY (a Corporation), TUNGSTEN PRODUCTS COMPANY (a Corporation), MILL CITY DEVELOPMENT COMPANY (a Corporation), W. J. LORING, C. W. POOLE, R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN, C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A. TWIGG, J. C. HUNTINGTON and LENA J. FRIEDMAN, Individually,

Appellees.

APPELLANT'S REPLY BRIEF.

HOYT, NORCROSS, THATCHER, WOODBURN & HENLEY,
GEO. B. THATCHER and
WM. WOODBURN of Reno, Nevada,
and
JOHN G. JACKSON of New York,
Attorneys for Appellant.

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Appellees.

APPELLANT'S REPLY BRIEF.

The appellant respectfully requests permission to file this reply brief in answer to the contentions of the appellees presented in their respective briefs, feeling that it will be some assistance to the Court in the consideration of the extensive record and particularly the many questions of fact presented by the record and by the contentions of counsel.

We have endeavored to answer only such matters as have been presented in the briefs of appellees so that the Court may be fully advised in the cause.

LORING'S POSITION.

Appellee Loring in a statement of facts in his brief at the outset urges, first, that Taylor made an election which in substance constitutes an estoppel in favor of Loring; second, that Loring was an innocent purchaser for value without notice; and, third, that Taylor accepted in payment of obligations due him as a creditor from the Tungsten Company, moneys which Loring paid in on account of the purchase price under his contract.

The record discloses that Taylor in June, 1919, at the Belmont Hotel in New York, two months before Loring entered into his contract, told Loring that he intended to commence action and to get the stock due him under the contract from Friedman and the other defendants. (Record, p. 354.) This Loring admits. (Record, p. 714.) Loring first negotiated for the property by letter of date July 21, 1919. (Record, pp. 649–700.) On August 10th Taylor wired Loring that he intended to commence suit and asked if Loring had an option on the property. Loring replied that he had. At this time Loring, however, had no option to purchase the property. He was merely negotiating and he obtained his contract August 16th and executed it on that date. (Record, pp. 357, 708.) The record therefore discloses affirmatively that Loring had notice of Taylor's equities and claims in the premises.

Loring's claim that Taylor made an election is based upon the telegram previously referred to in which Taylor advised that he intended to commence action for the stock or to recover damages. Loring contends that he made an investigation concerning Taylor's suit and finding that he had commenced an action for damages, went ahead with his option. Loring's contention in this regard, made by his counsel, is, however, not borne out by his own testimony. Loring testified he signed his contract August 16, 1919; he testified also that the contract was signed after receiving certain telegraphic advice from his attorney, Booth B. Goodman.

> "Q. Was that before or after there had come to your knowledge the contents of the two telegrams just offered in evidence?
>
> A. Afterwards." (Record, p. 708.)

We ask the Court to examine the telegrams referred to in the record, pp. 707, 708, and the Court will find that the telegrams are of date August 19, 1919, two days subsequent to Loring's execution of the contract. Loring entered into the contract with his eyes open. He had notice of Taylor's claim in June and again in August; he had made no payment; he was under no obligation to go forward with the undertaking; the only money he had paid was a loan made to the Company secured by tungsten concentrates (Record, p. 709).

After Loring entered into his contract on August 16th, the defendant, Nevada Humboldt Tungsten Mines Company, called a special meeting of stock-

holders to authorize the sale and the execution of deeds, bills of sale, etc. Notice of this meeting was mailed to stockholders on or after August 16th, and the meeting was called for the 23d of August, 1919, thus giving seven days' notice. Taylor filed a protest in writing against the holding of this meeting upon the grounds that it was unlawful and that the proper notice required by the statutes of Nevada had not been given. In spite of the protest, the meeting was held, the contracts ratified and the execution of deeds, conveyances and assignments directed and made. This meeting was a direct violation of Section 96 of the General Corporation Law of Nevada, Statutes of Nevada 1913, p. 65, which provides that a corporation may sell all of its assets upon a vote of not less than sixty per cent of its outstanding stock at a meeting of stockholders, notice of said meeting having been previously given by mailing to each stockholder *at least fifteen days before the meeting.* This provision of the statute is mandatory and the sale made thereunder was void. We call the Court's attention in that regard to

Davis vs. Monroe W. & L. Co., 31 So. 695;
Jones vs. Morrison, 16 N. W. 854;
Farwell vs. Houghton Copper Co., 8 Fed. 66;
Sumers vs. Glenwood, 86 N. W. 749.

On October 27th, 1919, Taylor commenced suit as a stockholder to set aside the transactions with Loring. (Record, p. 1139.) The defendants later recognized the defects of this meeting and called

a further meeting of stockholders to be held April 19, 1920. This time they gave the proper notice required by the Nevada statute. Before the meeting of April 19th could be held, this suit was commenced and an injunction was issued herein restraining the holding of said meeting.

Considering the transactions, the actions of the Company in failing to give proper notice, the prompt action of Taylor in commencing suit to set aside the action of the stockholders, it cannot be said that Taylor was guilty of laches or want of diligence in commencing and maintaining this suit. Counsel for Loring insisted that Taylor waited until two hundred and thirty-three thousand, three hundred thirty-three ($233,333) dollars had been paid in before filing this suit. This is not a fair statement of what took place. Loring executed his contract on August 16th, after notice of Taylor's claims. He must have had knowledge of the meeting of August 23d and of Taylor's protest against the transactions of that meeting. In spite of this notice and without legal obligation, he paid fifty thousand ($50,000) dollars on September 1st; prior to that time he had made no payment. With his eyes open and with full knowledge of all the facts, he made the succeeding payment of October 1st, fifty thousand ($50,000) dollars, and although Taylor, on October 27th, commenced action to set aside the conveyance to Loring, Loring continued to make further subsequent payments. We think it may be safely said that Loring was in nowise misled or prejudiced by any actions of Taylor that he could

not, as a reasonable, prudent business man, have avoided. Moreover, there was no fiduciary relationship between Taylor and Loring, and nothing in any of the transactions would call for any further notice to Loring than that which was given.

It is further urged by counsel for Mr. Loring that Taylor accepted, in settlement of another suit, money which Loring paid in on the purchase price of the Tungsten properties. What were the facts? Taylor commenced an action as a creditor against the Tungsten Company for money loaned; a writ of attachment was issued and to release this attachment a bond was given, and later, to release the bond, an agreement of settlement of the suit was entered into, by which Taylor agreed to accept seven thousand three hundred thirty-four and 4/100 ($7,334.04) dollars, the Tungsten Company giving its check for one thousand ($1,000) dollars as the first payment on December 15th to Norcross, Thatcher & Woodburn, attorneys for Taylor. At this time neither the plaintiff nor his attorneys had any knowledge that this money was a part of any payment made by Loring, and only obtained knowledge of the fact a few days prior to the making of the second payment of six thousand three hundred thirty-four ($6,334) dollars on February 9th. Taylor had no alternative but to accept the second payment of six thousand three hundred thirty-four ($6,334) dollars. He took it as a creditor and not as a stockholder. (Record, p. 669.) There was nothing in this transaction which could constitute defense to this action so far as Loring is concerned.

MISREPRESENTATIONS PRIOR TO APRIL 2d.

Counsel for the appellees in the briefs submitted to this Court have omitted any attempt to establish the truth of the representations as to the development of the mine and assays of ore contained in the letters and telegrams sent by the defendants to Taylor prior to April 2, 1919. They rely entirely on the finding of the Court that these representations were true. We shall not here undertake a repetition of the argument contained in our opening brief which we believe conclusively establishes that the trial Court fell into an error in holding that the representations in these various letters and telegrams related to a condition at a specific point instead of being average conditions. We have devoted a substantial portion of our opening brief (pages 20–36) to establishing this fact and yet the appellees neglect any answer whatsoever. That the Court did err in failing to hold that the conditions represented were the average of the vein through the whole of a specified drift, and not at a particular point in the drift, is clear; for example, from such statements as: "Number Two north 275 feet from shaft *average* width of vein nine feet, *ore milling* one per cent. Number Two south 100 feet beyond Bancroft sampling; *average* width of vein four and one-half feet, value of ore, one-half of one per cent." (Exhibit 3, p. 783.) Moreover, not one witness for the defendants testified that the representations contained in the letters and telegrams prior to April 2d were true.

The only justification attempted in the brief of opposing counsel is a reference to Taylor's letter of February 24th, Exhibit "L," in which Taylor pessimistically advises the defendants to close the mine down and tells them that he would not be interested in the purchase of their stock save at a lower price. He refers to the fact that the tungsten market is poor and shows that conditions are far from persuading him that he had a desirable proposition. Instead of this supporting the position of the appellees, it seems to us to demonstrate conclusively that it was the motive for the defendants' telegrams and letters to Taylor which followed from that time on and up to the date of the Denver conference on April 2d. (See Exhibits 6, 8, 9, 10 and 13.) These each show the defendants' purpose was to present to Taylor a sufficiently optimistic view of the developments of the mine to persuade him that the proposition was worth while so as to overcome his evident reluctance and to bring him once more to the rescue of this distressed proposition.

MISREPRESENTATIONS AT DENVER CONFERENCE.

The Denver conference on April 2d, between Poole, Nenzel and Murrish on the one hand and Taylor on the other, has been reviewed at considerable length in both briefs. It is conceded by all parties that whether or not at that conference Nenzel, Poole and Murrish represented to Taylor that the mine contained sixty thousand (60,000) tons of 1.75 per cent ore, depends on whether or not the testimony of Taylor, corroborated as it is, is over-

come simply by the denials of Nenzel, Poole and Murrish.

Counsel for the appellees have cited to this Court cases in support of the rule that where there is conflicting testimony in an equity case, this Court will not be eager to reverse. These same cases clearly also hold that findings are open to review when the trial Court misapprehended the evidence or has gone against the clear weight thereof, and that the credibility of the witnesses is open to attack. (See also American Rotary Valve Co. vs. Moorehead, 226 Fed. 202.)

We submit that the denials of Messrs. Murrish, Poole and Nenzel are not worthy of belief, and in support of that assertion we first direct the attention of this Court to the statement of the trial Judge (Record, p. 1429), that it is "unreasonable" that at this meeting in Denver there was no discussion of tonnage prior to the time whe the parties agreed upon the contract which is the subject of this lawsuit. It is rather for us to point out that the judgment of the trial Court on this point should be taken as to the credibility of these witnesses appearing before him, than for the appellees to take the position that this testimony is within the protection of the authorities they cite.

In addition, the testimony of these three individuals show their unreliability. In the first place, we have Murrish—an attorney guarding the interests and guiding the activities of these defendants, the man who drew the contract, Exhibit "C" (p. 488), and no doubt thoroughly familiar with the law of

false representations. He, as did Poole and Nenzel, testified that no discussion of tonnage occurred until *after* the contract, Exhibit "C," had been agreed upon. Is it not sufficient for us to again state that to the trial Court this testimony was unreasonable (p. 1429). That Murrish was willing to go to unbelievable lengths in behalf of himself and his associates is further established by his testimony concerning Exhibit "Z" (p. 933). (*Note*, the Record incorrectly refers to this as Exhibit "Q" on pp. 650, 651. See p. 654.) He testified that this paper, with its interlineations in handwriting, was prepared at the San Francisco conference early in June and had been the subject of discussion at that time (pp. 638, 650, 651, 653). If this were true, it had a manifest and important bearing on Taylor's position. It was conclusively demonstrated by the testimony of Mr. Thatcher, undisputed and uncontradicted in any way and unexplained by Murrish, that this paper did not come into existence until several months afterward, that it was prepared by Mr. Thatcher, and the interlineations were in his handwriting (pp. 732, 733). Concerning the testimony of Mr. Thatcher on this point, the leading counsel for the defense said: "So far as the witness (Thatcher) has gone, so far as my client is considered, we admit the fact as stated by you" (p. 733). The unavoidable inference can be left to this Court without further characterization of Mr. Murrish.

In view of these facts, carefully neglected by opposing counsel, what force remains to their arguments based on assertions that Mr. Murrish was a

trained lawyer of high character and standing in his profession? If he was so willing to testify under oath in the trial of this action to a matter which he must have known was false, and concerning which no mistake could have been made, is any credence to be given to his denial that the representations with which he and his associates are charged were not made? We ask the Court to read the testimony of Mr. Murrish which appears at page 769 et seq. of the Record, and particularly the trial Court's attitude toward it.

As to Poole—it will be recalled that Poole was unable to remember that he was charged at the San Francisco conference with having represented to Taylor in Denver, on April 2d, that the mine contained 60,000 tons of ore (p. 511). It made no impression on Poole, the university graduate, the mining expert of standing and responsibility, that he had been charged with a deliberate misrepresentation of the condition of the mine, in spite of the fact that the making of the representations was testified to affirmatively by three witnesses for the plaintiff, Messrs. Taylor, Bayless and Jackson, and admitted by his associates, Murrish and Nenzel. Surely no man of character and responsibility would fail to recollect so serious a charge directly relating to his own profession.

Poole is the witness who testified that never on any occasion at the Denver meeting did he represent or state or say that there was 60,000 tons of ore or any other ore or even one ton of ore of any value whatsoever in the mine. This in face of the undis-

puted fact that Taylor's letter suggesting the Denver conference requested them to bring *exact data* as to development work, assays, etc., so that a definite tonnage statement of present ore developed could be worked up. (Exhibit 12, p. 797.) Again in face of the further fact that this Company owed two hundred twenty-five thousand ($225,000) dollars, and that the Taylor contract was to secure by borrowing for the Company a sum sufficient to liquidate this indebtedness (p. 953); and Poole admitting that Taylor repeatedly stated that he was going to put this deal up to eastern bankers on a banking basis (pp. 480, 576–580). How could Poole testify so affirmatively, so in detail and so positively as to what took place in April in the Denver conference when he cannot recollect a serious charge of fraud against him made subsequently in June in the San Francisco conference?

As to Nenzel—we have pointed out that Nenzel's telegrams with reference to mine conditions were false. No attempt was made to justify them or to prove their truth. It is fair also to point out that the defendants' counsel carefully abstained from permitting Nenzel to testify to anything that occurred in the way of conferences, sending of telegrams or writing of letters prior to the conference in Denver on April 2d; thus counsel for plaintiff was foreclosed from cross-examination of Nenzel on all of the representations which he had made prior to that date.

STATEMENT BY TAYLOR OF QUANTITY OF ORE IN THE MINE.

Stress is laid by opposing counsel on the fact that from time to time Taylor, in circulars and in a paper used at the Denver conference (Exhibit "B"), referred to the ore blocked out in the mine in figures other than 60,000 tons. It seems to us sufficient to answer all arguments based on these grounds by stating—first, the admitted fact that Taylor was seeking to borrow money for this mine on a banking basis, and every reference to tonnage other than 60,000 tons is related to a statement that the tonnage mentioned will secure the amount of money requested to be loaned. For instance, in the letter to the Crucible Steel Company (Exhibit 32, p. 838), he speaks of an "assured minimum" of 43,000 tons. If there were a minimum, what was the maximum? The minimum was specified simply because on market values and on the basis of the proposition submitted in that circular letter, the amount of money Taylor sought for the mine was amply secured. The difference between the minimum so specified and the maximum of 60,000 tons represented to him, together with any future development beyond that point, was obviously the profit which the promoters hoped eventually to realize. In the Crucible Steel letter, Taylor concludes by requesting the Crucible Steel Company to loan one hundred twenty-five thousand ($125,000) dollars against concentrates to be produced from the mine and to be delivered at the rate of 25 tons per month. We cannot imagine Taylor, or any other business man, making a request

for one hundred and twenty-five thousand ($125,000) dollars unless some representations had been made to him as to an accurate, exact tonnage of commercial ore in the mine.

We do not need the plaintiff's testimony to corroborate this statement. We have the testimony of Mr. Poole to the same effect. If the Court will examine his testimony (Record, pp. 480, 2578) they will find that Poole admits that Taylor, at the Denver conference, discussed the necessity of the deal being on a banking basis and discussed tonnage with reference to the amount required at certain market values to secure the return to the lenders of the money to be borrowed. We believe that there is no single reference to any other tonnage than 60,000 that is not of a similar character. Exhibit "B" (p. 897), to which so much attention is paid by opposing counsel, is itself corroborative of our statement. It says: "In order to make investment save, only necessary to show at $8.00 market, 35,400 tons of ore; $10.00 market, 25,500 tons of ore" (Record, p. 480). We submit in conclusion that this argument of the defendants is no more than an attempt to convert Taylor's conservatism in dealing with the people from whom he sought to borrow money into an argument to relieve these defendants of positive fraud. If Taylor desired to fabricate his testimony and make it correspond with the figures represented by him to the Crucible Steel Company and others, nothing could have been easier—the Complaint and the proof in this case would have been 40,000 tons and not 60,000 tons.

The fact that he failed to do this is the best evidence that the representations were as alleged by Taylor.

TAYLOR CORROBORATED.

It is perhaps not in order to extend this reply brief by a further discussion of the evidence which corroborates Taylor's testimony. It is reviewed at length in our main brief. We think it is in order, however, to briefly call the Court's attention, first to the intrinsic improbability of no discussion of tonnage at the Denver conference. The trial Court (p. 1429) agrees with us that this was "unreasonable." Next, the most significant corroboration of Taylor's testimony is found in the comparison of the mine map (Exhibit "Y") brought to Denver by Poole and his associates with the plate 5, attached to Bancroft's first report (part of Exhibit 15). This plate shows transferred to it the same extensions shown on the mine map and figures of tonnage and detail of assays that were given to Taylor by Poole and much of it taken from the mine map, Exhibit "Y" (Record, pp. 553–561). The defendants admit that Poole gave Taylor data as to mine development, assays and values which were transferred by Taylor to the photostat plate, but claimed that Exhibit 15 was not the same photostat; that this data was given after the contract was agreed upon and was being typed. Poole throws in, for good measure, a statement—"I told him he could rely on the distances as they were made by Huntington but cautioned him about the values as being only estimates" (Record, pp. 514–547). Imagine a man

making this statement to another from or through whom he expects to borrow almost a quarter of a million dollars, a man who he admits said, and Taylor did say, at the Denver meeting that he was going into this deal on a banking basis and expected to put it up to New York bankers and trust companies.

Nenzel and Murrish also testified that no discussion of tonnage or values occurred until after the contract of April 2d was agreed upon and being typed—(Record, pp. 604, 608, 616, 617, 634, 635). They complete the perfect alibi of the guilty man and evidence the guiding hand of Murrish the lawyer—just as in the San Francisco conference when, according to the defendants' own testimony they remained silent when charged with misrepresentations until they could confer together and return advised what to say (pp. 611–613).

The fact that these defendants, at the San Francisco conference, were each charged with and *failed to deny* having misrepresented the condition of the mine to Taylor, is supported by the testimony, not only of Taylor, but of two corroborating witnesses, Bayless (pp. 128, 130) and Jackson (p. 424), and by the admission of two of the defendants, Nenzel (p. 610) and Murrish (p. 634).

We submit Taylor's version of the Denver conference must be taken as true.

TAYLOR UNDERSTOOD THE STATEMENT THAT THE MINE CONTAINED SIXTY THOUSAND TONS OF ORE WAS A REPRESENTATION OF FACT AND NOT AN OPINION.

Both briefs filed in this court on behalf of the appellees refer to certain testimony of Mr. Taylor to support an argument that all Mr. Taylor believed he was obtaining from Mr. Poole was the latter's opinion that the mine contained 60,000 tons of ore. There is no question but that the record does contain the questions and answers quoted by opposing counsel. We believe, however, that if the entire cross-examination of Taylor in this connection is read by this Court, bearing in mind that at the time Taylor had been subjected to a long cross-examination by a very distinguished counsel of great ability, assuming a legal significance of the word "opinion" far beyond any meaning intended by Taylor, that this Court will come to the conclusion that beyond a doubt Taylor believed that Poole was telling him a fact and that Taylor relied upon this statement as being a fact.

We quote from the record as follows (pp. 147, 148, 150, 151, 152, 154):

"Q. You believed that from such information as Mr. Poole had, that in stating to you, as you say he stated, that there was 60,000 tons of ore in sight, that he was giving you his best opinion?

A. I supposed he was stating the conditions of the mine.

Q. You didn't suppose, did you, that he had a knowledge as to what was in that block of ore, or that he could have any accurate knowledge from the data that you knew he then had, in view of the extent of the development of the mine?

A. I supposed Mr. Poole knew what he was talking about when he made statements to me as an engineer.

Q. You supposed he could see into the ground, and knew under those conditions as to how much ore was in sight, did you?

A. No.

Q. You supposed then, did you not, that you were merely getting his opinion, *based upon such development as then existed,* as to how many tons would probably be there?

A. Yes.

Q. And that was all you did expect to get from Mr. Poole on that point, wasn't it?

A. Yes. . . .

Q. Did he, as a matter of fact, express any opinion whatever to you?

A. He did.

Q. What did he say?

A. He told me very positively that there was over 60,000 tons of ore developed in the mine, which would average over 1.75 per cent tungstic acid.

Q. That that was his opinion?

A. It was his statement. . . .

The COURT.—You may repeat any conversa-

tion you had which would indicate whether it was an opinion or a positive statement.

A. His statement was very positive it was over 60,000 tons.

The COURT.—That is your opinion, repeat now just what was said.

A. I could not repeat his exact words, your Honor.

Q. Give it as near as you can.

A. Well, I don't know that I can say anything further than that he stated, said there was, his words would have been these: 'There are 60,000 tons of ore that will average over 1.75 per cent developed in the mine.' The opinion was expressed by all of them that that probably was not the maximum amount of ore, that additional ore could be expected, but that that was proven and developed at that time.

Mr. WHEELER.—Q. What did you understand him to mean when he said that ore was developed at that time?

A. I understood that he meant ore that was blocked out.

Q. What do you mean by blocked out?

A. Well, I should say was proven in the mine, that you could count on that tonnage of ore being there definitely.

Q. Was proven that it is probable or definite?

A. I should say blocked out would mean definite.

Q. So notwithstanding the map that was shown you, the extent of the workings and such

experience in mining matters as you had had up to that time, you understood that it was represented to you that 60,000 tons of ore was blocked out in that mine?

Q. Yes, sir. . . .

Q. At any rate, you wish it understood that you implicitly believed from that moment forward that it was an assured fact, and not a mere matter of Mr. Poole's opinion, that that quantity of ore, to wit, 60,000 tons, of the assay value of an average of 1.75 was surely in that mine?

A. Yes, sir. . . .

Q. But from that moment forward the question did not enter your mind—your mind—but that there was at least 60,000 tons there?

A. No, it did not; I had implicit confidence in Mr. Poole's statement.

Q. You believed that implicitly; and from that moment forward you were prepared to represent to any person whom you invited in that there were 60,000 tons of ore there?

A. I was prepared to, and did so."

If the Court will bear in mind that this testimony of Taylor relates to statements made to him by a mining expert in charge of operations at the mine, and who had brought, in response to Taylor's request, "exact data as to development work, assays, etc. (Exhibit 12, p. 798)," we submit that the conclusion is inevitable that Taylor took this statement by Poole as statement of fact and of the exact condition of the mine at the time of this conference in Denver.

RELIANCE ON BANCROFT.

It is urged by appellees that Taylor relied upon Bancroft, the mining engineer, and upon examinations to be subsequently made by him and not upon the representations made by the defendants. The appellees must know that this is not the fact because just previous to the Denver meeting and after it had been arranged by telegrams and letters and before the defendants left for Denver, they received a telegram from Taylor in which he said: "Bancroft's plans changed At Palace Hotel San Francisco today He may or may not come back via Denver Stop However *do not believe his presence necessary for proposed conference* Would be glad to see Messrs. Poole Murrish and Nenzel." (Exhibit 52, p. 891). Moreover, it is undisputed that Taylor, following the making of the contract of April 2d (Exhibit 16) at once proceeded to try to raise the money for these corporations. As reviewed at length in our opening brief, Taylor first sought to borrow the money in Denver, then went to the mine so that he could assure prospective investors that he had seen the mine and that it was a working proposition; then he went to New York, where he conferred with various people for the purpose of interesting them in the proposition; he employed counsel both in New York and San Francisco, and sent substantial amounts of money, approximately six thousand seven hundred ($6,700) dollars (Exhibit 27, p. 833) for traveling, hotel bills and in other directions, all before any report had been received from Bancroft, and much of it before

Bancroft was employed to make his second examination. It is also undisputed that Bancroft was employed not at Taylor's suggestion, nor on his initiative, but at the instance of Thane, an associate of Taylor in the contemplated deal, who was to subscribe twenty-five thousand ($25,000) dollars (pp. 176, 178).

Reliance is not a mere mental attitude; it consists in the acts done pursuant to representations. The authorities contained in our opening brief establish beyond a doubt that it is not necessary that Taylor should have relied *solely* on the representations made by the defendants. It is sufficient to support his cause of action if they were an inducing cause.

The point is made by appellees that Taylor's demand is unconscionable. They neglect, however, the fact that Taylor had come to the rescue of the Mines Company with large loans (see contract, Exhibit "A," attached to Complaint, p. 1148) that he made loans to it without security (pp. 621, 622, 625), and this at a time when the tungsten market was demoralized (see Exhibit 1, page 779, and Exhibit "C" attached to Complaint, p. 1161). No fiduciary relationship existed between the parties, the defendants were all men of experience in the business world and a large part of Taylor's proposed compensation was to be used as a bonus to obtain loans or effect sales of stock (pp. 187, 191, 928). That Taylor's contract and demand were neither conscionable nor unreasonable is shown by the fact that he was willing to go forward with the deal if forty

thousand tons of commercial ore was available. This left a small margin over the thirty-five thousand tons necessary to pay the debt (Exhibit "B") at an eight dollar market. A five thousand ton margin was the equivalent of thirty thousand dollars ($30,000). If Taylor had retained sixty-two per cent (62%) and given none of his stock away as a bonus, his share of it would have been but eighteen thousand dollars ($18,000). He had spent approximately sixty-seven hundred dollars ($6700) for expenses. His net return at that time would have not been in excess of twelve thousand dollars ($12,000)—a bare profit of five per cent (5%) on the transaction. Moreover, Taylor at the San Francisco conference, when it was found that there was only about nineteen thousand ($19,000) tons of ore on hand, offered to advance seventy-five thousand dollars ($75,000) towards the payment of the debts and an additional ten thousand dollars ($10,000) for working capital and future development of the mine, and to pay and advance additional amounts from time to time as ore was developed and exposed in the properties.

In conclusion we submit the following authority as aptly meeting the situation presented:

In McGowan vs. Parrish, 237 U. S. 285, an equity suit was commenced in the Supreme Court of the District of Columbia by McGowan and Brookshire, two attorneys, as complainants, against appellee as executrix of Joseph W. Parrish, deceased, together with the Secretary of the Treasury and the Treasurer of the United States. The object of the suit

was to establish and enforce a lien upon the fund of $41,000, which was paid by the Government for services rendered by the complainants in the prosecution of the claim. An agreement in writing was made between Parrish and McGowan whereby the former employed the latter as his attorney to prosecute and collect the claim, agreeing in consideration of the professional services to be rendered by McGowan and others whom he might employ in the prosecution of said claim that he, Parrish, would pay to McGowan a fee equal in amount to fifteen per cent of whatever might be awarded or collected. Later, by consent of both parties, Brookshire, also an attorney, was engaged to co-operate with McGowan, the latter making an agreement with Brookshire giving him an undivided one-third interest in the contract, the purpose being to give him five per cent of whatever amount should be awarded or collected upon the claim. Thereafter, McGowan and Brookshire co-operated and unquestionably rendered services of value. They succeeded in having the claim allowed by the auditors for the War Department. The Secretary, however, made further investigation and decided to refuse to pay the amount ascertained by the auditors, or any sum. Shortly after this, friction and disagreements developed between Parrish and the attorneys respecting the next steps to be taken, and they continued until Parrish's death. No active steps were taken during this period toward pressing the claim. Parrish's daughter was appointed executrix of his estate and she employed other counsel, with the result that eventually $41,000

was allowed and paid on the claim. McGowan and Brookshire wrote the executrix offering to proceed with the prosecution of the claim and asking her co-operation. She, on the other hand, contended that they had abandoned the prosecution of the claim and refused to have anything further to do with them.

The pertinent portions of the opinion in this case are:

1. With reference to the jurisdiction of a Court of Equity, the Court at p. 296 says:

> "The simple issue that remained was, of course, of such a nature that it would have been the proper subject of an action at law, had it not originally been bound up with questions appropriate for decision by an equitable tribunal, but 'a Court of Equity ought to do justice completely, and not by halves'; and a case once properly in a Court of Equity for any purpose will ordinarily be retained for all purposes, even though the Court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. (Camp vs. Boyd, 229 U. S. 530, 551, 552 and cases cited)."

and

2. With reference to the right to recover compensation for services and the amount thereof where the person is precluded from completing the services rendered through the fault of the other party. As to this question the Court at p. 299 says:

"The evidence further shows that the executrix had been fully cognizant, during her father's lifetime, of the general situation respecting the ice claim and knew that McGowan and Brookshire were the attorneys in charge of it; she knew Mr. McGowan had advanced considerable sums to her father for his support and hers, and that these advances remained unpaid at his death; the letter of November 19th and a copy of the reply were among her father's papers and came to her knowledge not long after his death; *and the circumstances show that she was not willing that McGowan or Brookshire should have anything further to do with the claim, and that they were made aware of this. We think they were not called upon to make an express offer of their services to the executrix.*

Complainants are, therefore, entitled to compensation; and since the attorneys' services were admittedly of great value, and resulted in securing to Mr. Parrish, as this Court in effect held in 214 U. S. 90, 124, a complete right to the payment of the money, *and since it was his fault and not theirs that the final steps to recover it were not taken by them, no reason is shown why complainants should not receive the entire amount stipulated for in the contracts.* (Italics ours.)

We respectfully submit that the decree of the District Court should be reversed.

Respectfully submitted,
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No. 3902.

In the United States

Circuit Court of Appeals

For the Ninth Circuit

DAVID TAYLOR, Appellant,

vs.

Nevada Humboldt Tungsten Mines Company, a corporation, Tungsten Products Company, a corporation, Mill City Development Company, a corporation, W. J. Loring, C. W. Poole, R. Nenzel, H. J. Murrish, L. A. Friedman, C. H. Jones, G. K. Hinch, J. T. Goodin, V. A. Twigg, J. C. Huntington and Lena J. Friedman, individually, Appellees.

Closing Memo Brief of Appellees Other Than W. J. Loring

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Closing Memo Brief of Appellees Other Than W. J. Loring

Since the oral argument on November 13, 1923 was had before the Court, appellant has served and presumably filed, a so-called "Reply Brief".

Certain contentions are therein advanced to which we wish briefly to reply.

On pages 3-4 counsel say the stockholders meeting on August 23, 1919 was a direct violation of Section 96, Nevada General Corporation Laws, which purports to authorize a corporation to sell all of its assets on a vote of 60% of its outstanding stock at a meeting held on at least fifteen days notice, and counsel argue that because the August 23rd meeting of stockholders of Nevada Humboldt Tungsten Mines Company and the other two companies was held on seven days notice, the contract of sale to Loring was void, etc.

A sufficient answer to the foregoing is that Loring contract **did not embrace all of the assets** of the corporations, as the contract (Rec. 869) specifically excepted certain property worth from about $500.00 to over $1,000.00 and in addition excepted also the corporate books and franchises.

Counsel say (Rep. Br. 7) that we have omitted any attempt to establish truth of representations in letters and telegrams sent by defendants to Taylor prior to April 2, 1919. One answer to this is that **there is no evidence** in the record showing such representations were untrue. Plaintiff is on this point absolutely forced to rely solely on Bancroft's report (Plate 5-A, Rec. 1507) and we say that so far from that report showing such repre-

sentations untrue, they confirm the correctness of such representations. The main attack is directed to Nenzel's telegram of February 23, 1919, copied in letter of February 24, 1919 (Rec. 783). In appellant's opening brief (page 32) counsel concede correctness of the finding of the trial court as to items 6 and 7 stated in said telegram, as said items were numbered by the trial court (Rec. 1424). We will, therefore, consider only the remaining items of Nenzel's telegram.

ITEM 1.

> "The number one drift south is eighty-five feet beyond granite dyke Ore low grade".
>
> The trial court says (Rec. 1425):
>
> "Tested by Bancroft's assays Item 1 is correct."

Counsel, however, insist (Op. Br. 27, Rep. Br. 7) that the trial court was in error because the **average** of Bancroft's assays (Plate 5-A, Rec. 1507) taken over the **entire 85 feet** of drift, gives an average of only 22%WO3, and counsel say (Op. Br. 28) Nenzel was in error in referring to this as "low grade" and say 22% is no ore and worthless. But there is no evidence onywhere in the record as to what percent tungstic acid the rock must carry in order to be considered "low grade". We say counsel's unsupported statement that 22% rock is worthless, and that Nenzel in referring to it as "low grade" is, therefore, guilty of mis-

representation, can not be considered as evidence at all, and certainly not against the positive finding of trial court that "tested by Bancroft's assays" Nenzel's said statement as to "low grade" is correct. Further, according to Bancroft's said plate at a point on drift about 70 feet out, the ore was very rich and ran 3.70%. Nenzel did not say the **average for entire 85 feet** or for any number of feet of drift showed ore of low grade, or of any grade. He may have referred to the ten or fifteen feet nearest the breast, over which distance the average was 1.31% according to plaintiff's own witness Bancroft. But whether we take only the last 15 feet or so, which probably covered the point where breast of drift was at the time Nenzel wired, or whether we take average of the entire 85 feet of drift as "low grade", we say tested by Bancroft's assays, Nenzel was telling the absolute truth and the said finding of the trial court to that effect was right, and the only one that could have been made under the undisputed evidence.

ITEM 2.

"Drift number one sixty feet beyond Bancroft sampling stop Number two south tunnel sixty feet beyond Bancroft sampling Value of ore one and one-half percent stop."

As to this item the trial court found (Rec. 1425):

"Bancroft's assay taken sixty feet beyond his first sampling in number two south was 2% instead of 1.50%".

Nenzel was undoubtedly talking about the grade of the ore found at the point in drift as indicated by him, viz 60 feet beyond Bancroft's first sampling, and at that point the ore was actually 2% according to the plaintiff's witness Bancroft, instead of 1.50% as stated by Nenzel. Nenzel says absolutely nothing about the **average** grade of the ore over the sixty feet of drift, which counsel insists (Op. Br. 28) should be read into Nenzel's telegram, and then because such **average** is only .63% as found by the trial court (Rec. 1425) that Nenzel's telegram, as so reconstructed, should convict him of falsehood.

ITEM 3.

"Number two north two hundred and seventy-five feet from shaft average width of vein nine feet Ore milling one per cent stop.

As to this the trial court's finding is (Rec. 1425):

"Bancroft's assay taken 275 feet north from the shaft in number 2 was 1.60% instead of 1%."

Counsel (Op. Br. 29) attacks Nenzel's statement as to 1% ore at a point 275 feet north of shaft, and attacks Court's findings supra that at a point Nenzel referred to, the ore was 1.60% instead of 1% as stated by Nenzel, and counsel say the Ban-

croft report shows sixteen samples taken by him on this drift covering some 128 linear feet, and that the average was 34% and after they have so reframed and reconstructed Nenzel's telegram and because Nenzel's statement as to value does not square up with the reconstructed telegram, they say his statement is untrue and court's finding is wrong. But inasmuch as Nenzel's statement is undoubtedly directed to a specific point, i. e. 275 feet North of shaft, we say it is manifestly unfair to attempt to spread his statement generally over portions of drift as much as 128 feet distant from the point Nenzel was actually talking about. If as counsel contend, the 275 feet point is to be disregarded and average values in the drift is to be taken to test truth of Nenzel's statement, then why do not counsel take the entire 275 feet instead of only 128 feet thereof covered by the Bancroft last sampling? In the portion of the drift so excluded by counsel, Bancroft finds values of 2.05%, 2.25%, 1.55%, 1.15% etc. The only "average" in this item mentioned by Nenzel is as to the width of vein and this average undoubtedly referred to the vein as found in immediate proximity of the 275 feet point at or very near which precise point Bancroft's plate shows vein to be about 4½ feet in width. But that this vein is strangely erratic as to width (as well as values) is convincingly shown by the Bancroft report, for in this very drift he

finds vein to be 7.3 feet at one point, and only 10 feet distant he finds it to be but 2.8 feet; at another 5.3 feet and 10 feet distant only 0.75 feet; at another 5.33 feet and only 10 feet away but 1.7 feet. Hence the vein may very well have been 9 feet just as Nenzel said between some of the points where it was actually measured by Bancroft. Bancroft's report does not pretend to say vein was not 9 feet wide at **any** point, but only what his samples were at **fixed points** taken by him 10 feet apart. If therefore, the vein admittedly varied at widths as much as nearly 5 feet in a distance of 10 feet, how can this court or any one say it may not have varied 4 or 4½ feet **between** the Bancroft points and Nenzel be entirely correct in his 9 feet statement, based as it undoubtedly was on the width of vein at or near the then breast of the working. Bancroft's Plate 5-A first figures merely give **width of sample,** i. e. length of his sample cut (Rec. 237-241) and hence, not necessarily **width of vein at all.** Hence we say the attack on the trial court's finding as to this item is without any merit whatever.

ITEM 4.

> "Number two south one hundred feet beyond Bancroft's sampling Average width of vein four and one-half feet Value of ore one and one-half percent stop."

As to this the trial court finds (Rec. 1425) that

this item was inaccurately designated and no further finding is made regarding it, and counsel say (Op. Br. 31) that said statement of the trial court is correct.

ITEM 5.

> "Number three north drift sixty feet from shaft vein ten feet wide Value of ore one and one-half per cent stop."
>
> As to this item the trial court says (Rec. 1425):
>
> "Bancroft's nearest assays sixty feet north on number three were 1.20% and 1.35% instead of 1.50%. Five assays taken by Bancroft within sixty feet from shaft averaged 1.89%."

Counsel (Op. Br. 31) say that **average** of ore over forty feet of drift, i. e. five of Bancroft's samples, is 1.92%, but that according to Bancroft, the **average width** of vein over these sixty linear feet is only 6.51 feet. But Nenzel does not say **average** width is 10 feet and Bancroft's plate 5-A shows that at sixty foot point the vein is 6 feet wide and about sixteen feet beyond is **9.4 feet** wide. So Nenzel was substantially correct, even tested by Bancroft's measurements. Here also from Bancroft we find near this very point that in 10 feet this erratic vein widens from 4.33 to 9.4 wide. Moreover inasmuch as Nenzel's statement as to value of 1.50% at a given point in drift, is substantially exceeded by the Bancroft finding of 1.92% for

the average in that part of the drift, the **excess value** would doubtless more than compensate even if there was a **loss in width** as claimed.

The foregoing establishes that even tested by Bancroft, Nenzel's wire of February 23, 1919 is as nearly correct as can reasonably be expected. No two expert mining engineers will get precisely the same results and Nenzel was not even a mining engineer or a miner at all, but simply a young man who did the bookkeeping and only some of the correspondence for the company. He obtained his figures from Morrin, the mine superintendent and Morrin's estimates as to widths and values were obtained from pannings and mill returns and not from close assays, and Taylor was advised of this prior to and at the Denver conference. Bancroft says (Rec. 259) that panning is not exact and that unless check samples are cut in the same place and same widths taken, the results will not approximate. And when sampling mine in May, 1919, and before assay returns were received on his sampling Bancroft wired Taylor (Exhibit "I", Rec. 908) that "required tonnage", i.e. 40,000 tons were exposed and he testifies (Rec. 253) he was very much surprised that assay returns showed less than half that tonnage. Plaintiff's expert Bancroft seems to have been a poorer "guesser" than Nenzel, who was not even a miner, to say nothing about being an expert.

Counsel complain (Rep. Br. 7) that we rely entirely on trial court's findings that Nenzel's statements supra were true and that we produced no witness to prove they were true. The obvious answer to this is that plaintiff's own witness Bancroft on the trial **verified Nenzel's statements on all material features** and hence there was no occasion to call witnesses to prove what was substantially and satisfactorily established, and for the same reason we can now safely rely on the trial court's finding, because **it is based on the evidence of plaintiff's own witness.**

On top of all this is the admitted fact that the very next day after the Nenzel telegram supra, Taylor writes Nenzel, (Rec. 779) "The best thing to do all around would be to close down". So even conceding away our contention that Nenzel had in no way misrepresented, the fact remains that Taylor shows by his said letter he was in no way misled or even impressed by Nenzel's said statements, giving them for the moment, the construction as claimed for by counsel.

Further it can not fairly be claimed, as counsel do, that the alleged representations of Nenzel were made **to induce** Taylor to enter into the April 2nd contract, or to enter into any contract. On January 16, 1919 defendants and Taylor executed in two documents a contract (Rec. 1148-1153) covering this same property and under which contract

they were continuously operating from January 16, 1919 to April 2, 1919, and so operating therefore, at the very time that Nenzel sent the telegram. The January 16th contract differed in its scope from the April 2nd contract, but it was nevertheless a contract and Taylor did not give defendants any notice **until some time in March** 1919 (Rec. 1130) that he would not go through with the January 16th option contract. How then could any representations made by Nenzel in February or March or made by any of the defendants **prior to such notice in March** be made to "induce" Taylor to enter into the April 2nd contract? Prior to such notice in March defendants were not expecting or contemplating any new contract or arrangement with Taylor, but were going forward on the presumption that until they were notified by Taylor, the January 16th contract was subsisting and satisfactory.

Further, is the extremely significant and important fact that Nenzel in his letter to Taylor on **March 27, 1919** (Rec. 801) states:

> "Owing to the consolidation of the Rochester properties now under way at Rochester Mr. Poole, as well as his engineering force, has been rather busy and **no accurate survey of mine development has been made since Mr. Bancroft was out here.** .We however expect to have our engineer out there within a week or so to check up development work and no doubt you will receive a report noting the

changes that have been made since Mr. Bancroft completed his work of examination."

In the first place this letter is nothing more or less than a statement to Taylor that Nenzel's previous advices of values, width of vein etc., **were mere approximations.** They could be nothing more and Taylor on March 27th must have known that they were nothing more than mere approximations, for on that day he was told by that letter that since Bancroft was there, which was about January 27th, "No accurate survey of mine development" had been made. Passing for the moment all other contentions, we say that when Taylor received the March 27th letter, and from then on, he had absolutely no right to claim reliance on Nenzel's wire of February 24th over a month prior, regarding values or widths of the vein, except as mere approximations. Indeed the March 27th letter was in effect a positive notification to Taylor that **all** figures as to values and size of vein given him since Brancroft was there, and until the making of an accurate survey, were mere estimates.

In the second place on April 2nd at Denver conference, Taylor **knew from this letter** that Poole, Murrish and Nenzel had no "exact data" as to values or size of vein at the Denver meeting, which was on March 30-31 and April 1st and 2nd. By the March 27th letter supra Taylor knew **Poole had**

made no survey because he (Poole) had been and then still was busy at Rochester. Taylor knew moreover that no "exact data" or any dependable data or detail whatever could possibly have been obtained by Poole between March 27th when Nenzel wrote, and March 29th when Poole left for Denver, because the evidence shows (Rec. 44) that Poole, Nenzel and Murrish left Lovelock for Denver on **March 29th** and so wired Taylor. Taylor knew at Denver conference that no survey had or could be made between March 27th and March 29th. Nenzel stated in the March 27th letter that the engineer (of course meaning Poole) was expected at mine "within a week or so". Taylor knew it took Bancroft ten days for a checking up from January 17th to the 27th, and must have known it would doubtless take Poole about the same time to do same work. Hence if instead of beginning on job "within a week or so" Poole had started in immediately on March 27th, he could not possibly have progressed far enough to have gotten any dependable data or detail for the Denver meeting, to attend which, Poole left Lovelock on March 29th. Poole tells us (Rec. 536) and it is no where disputed that **he was not at the mine** from the time of the Bancroft examination in January 1919 until **April 9th** of same year.

Much is sought to be made by counsel re point of "exact data, assays etc." referred to by Taylor

in his letter of March 25, 1919 (Rec. 797). But that Taylor then fully expected to have Bancroft present at meeting and that the "data" was wanted to enable Brancroft to calculate tonnage, is certain, because it was not until three days later, on March 28th, that he learns Bancroft cannot attend and he then wires defendants (Rec. 891) advising them Bancroft cannot be there and inasmuch as meeting was fully arranged for, Taylor doubtless figured that it might as well be held anyway, and so he adds in telegram, "would be glad to see Messrs. Poole, Nenzel and Murrish". Note the significant fact that now that Taylor had abandoned the idea of having Poole and Bancroft together work up a tonnage statement, he makes no suggestion in his telegram of March 28th that Poole, Nenzel and Murrish are nevertheless to bring on the data, which according to his letter of March 25th, was to have been only for Bancroft's use. Taylor tells us he relied "implicitly" on Poole, and if so he could not have wanted "exact data" to check up a man in whom he had "implicit" confidence. Besides Taylor tells us (Rec. 123-124) that **he didn't know how to calculate the quantity of ore in a mine.** In view of the foregoing we say Taylor knew on March 27th there was no exact or any dependable data re quantity or quality of ores, and that in absence of Bancroft, the meeting could accomplish nothing more than it actually did, i. e. the

formulating of a contract, with Taylor relying and expecting to have a subsequent examination by Bancroft before he (Taylor) made any cash outlay.

ALLEGED MISREPRESENTATIONS AT DENVER CONFERENCE

Counsel say (Rep. Br. 8) that Taylor's testimony that Poole, Nenzel and Murrish represented the mine contained 60,000 tons of 1.75% ore, is "corroborated". We deny that there is a scintilla of "corroboration" in the record and assert on the other hand that Taylor's said testimony is impeached out of his own mouth, and we cite:

1. Taylor swears on August 9, 1919 in his separate action at law for damages for the same alleged frauds, that Poole's representation was "**over** 60,000 tons of scheelite ore which would carry from 1.50% of tungstic acid to 1.75% of tungstic acid". (Rec. 1289-1290, 1414-1418). In his complaint in the instant case (Rec. 1133) Taylor swears that representation was—

> "x-x on said second day of April, blocked out, in sight, and ready for mining and reduction into concentrates over 60,000 tons of scheelite ore which would carry an average **of 1.75**% tungstic acid."

There is a radical difference between "1.50% to 1.75%" and "an average of 1.75%". Neither Taylor nor his counsel have even attempted to explain

why he swears at one time that Poole's representation was 1.50% to 1.75% and at another time that the representation was an unqualified "average of 1.75%".

2. On direct examination Taylor testifies (Rec. 56) that Poole's representation was that there was 60,000 tons which would "average **over** 1.75% Tungstic Acid". Again on cross-examination he says (Rec. 150) Poole's representation was—

> "He told me very positively that there was **over** 60,000 tons of ore developed in the mine which would average **over** 1.75% tungstic acid.

Then in answer to a question by the Court (Rec. 151) Taylor says Poole's representation was:

> "x-x his words would have been these, " 'There are 60,000 tons of ore that will average **over** 1.75% developed in the mine.' "

Thus we find that at one time according to Taylor it is **over** 60,000 tons; at another it is "**are** 60,000 tons". He was not sure (Rec. 152) that the words "blockel out" were used at all, "It might have been " 'developed' ". Then he says (Rec. 154) **at least** 60,000 tons. Later on, same page, he says that representation was that "there were **more** than 60,000 tons". He declares in his complaint that the representation was that the ore was "blocked out" but on the trial he will not say (Rec. 152) that the words "blocked out" were used. Again on cross-examination (Rec. 445) he will not

say whether the exact words in his complaint were used, nor whether the words "in sight" mentioned in complaint were used by Poole. He is not sure (Rec. 446) whether the words "blocked out" or "developed" were used by Poole, though he has alleged them in his complaint; that (Rec. 447) he did not remember the words "in sight" being used and he winds up (Rec. 448) by saying that he did not understand the representations to mean anything more or different, as he understood the phrases, than that there was that quantity of ore in sight.

Such evidence as the foregoing is too self-cantradictory, too doubtful, unconvincing and uncertain upon which to predict a conclusion of fraud, particularly so where it appears that Taylor had a motive for changing his testimony and allegations regarding the percentage of tungstic acid in the ore, viz, as appears in the following paragraph:

3. To prove his case he expected to use Bancroft's report. He had wired Bancroft (Rec. 906) to give him the quantity of ore in which 1.4% was recoverable; in other words 80% of 1.75% tungstic acid contents. Bancroft examined the mine under those instructions. His report (Rec. 824) would therefore be of no use whatever in the case if the representation had been that the ore "would carry from 1.50% tungstic acid to 1.75% tungstic acid" as alleged in Taylor's sworn com-

plaint of August 9, 1919, in Case No. 2263, his action at law for damages on account of the same alleged fraud. As Bancroft's report was essential to Taylor's contention in the present case, Taylor had a very strong motive for changing his sworn statement of August 9, 1919 in Case No. 2263. The fact that he did so change it is indisputable.

4. Another point against Taylor is that on his direct examination he represented to the Court that Poole gave him the lines, figures and tonnage (Rec. 47-49) reading the figures to him. That Poole read the figures from a map and memorandum, but on cross-examination Taylor was forced to admit that the figuring was done then and there and that he had participated in the figuring (Rec. 123) but declared that he made no figures of his own; **that he didn't know how to calculate the quantity of ore in a mine** (Rec. 123-124). He repeated that he didn't know how to calculate tonnage in response to a question by the court (Rec. 124), but later (Rec. 393) he flatly contradicts the sworn statement supra and says that he **was capable of figuring tonnage** on April 2nd and (Rec. 125) he was forced to admit that he might have proceeded to describe to Mr. Poole on April 2nd the method used by Mr. Bancroft in computing the quantity of ore in the mine and that Bancroft had told him (Taylor) the method.

5. The figures on Plate 5, Exhibit 15, are Tay-

lor's. The significant fact will also appear by comparison of Taylor's figures with those on Blocks "M" and "N" in Exhibit "Y", that Taylor placed the figures on Exhibit "Y".

6. The necessary inference is that on the day, whether April 1st or 2nd, that Poole and Taylor were doing this figuring, Taylor himself made the computations of tonnage; that prior to coming to Denver Poole had made no figures as to the quantity of ore in the mine; that he had no preconceived idea of representing a tonnage of 60,000 or any other specific number of tons or over to Taylor and that the figures on tonnage were the result of Taylor's own figures made by him according to Bancroft's method. Note also the significant fact that Exhibit "B" (Rec. 897) being pencil memorandum of Taylor, was prepared and used by Taylor in the negotiations at the Denver conference, although (Rec. 155-158-159-160) Taylor had entirely forgotten about this document when testifying on direct, as well as cross, until the document was produced for his inspection. And in that very memorandum, in his own handwriting, he is making use of expressions of about 25,000 and 35,000 tons of ore, and 60,000 tons which he claims Poole represented to him, is no where mentioned.

The memory of a man who fails to remember a document so important, is not apt to furnish the

"clear, unequivocal and convincing evidence" which the rule requires.

We have shown the plaintiff's own evidence is so unsatisfactory that he would not be entitled to a decree in this action even if it stood without other conradiction. . But the testimony of Messrs. Nenzel, Murrish and Poole flatly contradicts the plaintiff as to any statement whatever being made by Poole or any one about the 60,000 tons of ore averaging 1.75% being in the mine. To us it is inconceivable that their testimony is not to be treated as sufficient to completely overthrow plaintiff's self-contradictory, vague and unsatisfactory evidence.

He contradicts himself as to representations of value; now it is from 1.50% to 1.75%; next it is 1.75% and next it is "over" 1.75%. At one time he swears the representations were that the ore was blocked out, developed and in sight and next he is vague and uncertain as to whether those representations were used at all.

7. On Wednesday, September 15, 1920, on the trial in the lower court, he unqualifiedly denied that he knew how to calculate the quantity of ore in the mine (Rec. 123-124).

> "Q. I am not asking you what you might have done, I am asking the fact. Did you put any figures on the map?

A. To make any figures of my own I did not; I have never done any calculating of ore in a mine, **because I don't know how to do it.**

x-x-x

THE COURT: Q. Did you say you never had figured or calculated the amount of ore in a mine?

A. The amount of ore in a mine, **because I am not competent to calculate it,** I may have taken figures given me and multiplied areas into cubical contents."

On Friday, September 17, 1920 during said trial on cross-examination, he testified that he did the figuring in order to get the statement contained in his letter of April 17th that there was a minimum of 43,000 tons of ore in the mine and that he was capable of figuring tonnage on April 2nd.

"Q. You are capable of doing it (figuring tonnage) aren't you?

A. I am.

Q. And were on April 2nd, were you not?

A. I was."

8. Again (Rec. 59-60) Taylor in his direct examination testified:

"Q. Would you have entered into this contract, Mr. Taylor, except for the written and other representations which were made to you, as you have heretofire testified?

A. I should not."

But later, on cross-examination, Taylor denies truth of his statement supra as to his attitude regarding entering into the contract (Rec. 118).

"Q. Can you give us the substance of what

you said as to what you were willing to do on that Sunday? (March 30),

A. I was willing in a general way at that time to make a contract according to the terms that were finally arranged."

The point here is that on that Sunday, and admittedly two or three days **before** Taylor claims Poole made any representations whatever, Taylor was willing to make a contract the same, or substantially the same, as Exhibit "C". But if so, how can he be believed, when he says, supra, that he would not have entered into the contract but for the written and other representations, and when he says he relied "implicitly" upon Poole's representations as inducement thereto.

His own testimony is too contradictory, too vague and uncertain to measure up to his allegations of fraudulent representations. There is, therefore, no "clear, unequivocal and convincing" evidence whatever to prove that such representations were ever made.

"To establish fraud, the proof must be clear, unequivocal and convincing."

In Re Hawks (D. C.) 204 F., 309-316, and U. S. Supreme Court and other Federal cases cited to that point in the opinion.

Counsel make attack (Rep. Br. 9-10) upon Mr. Murrish, all because Mr. Murrish at first, and erroneously, identified while testifying (Rec. 638) the paper marked Exhibit "Z" (Rec. 933) as one

that was shown to himself and others at a meeting in San Francisco about June 4-5, 1919. Later (Rec. 770-774) Mr. Murrish explains the appearance of another paper, but similar in appearance, contents etc. that was actually and admittedly exhibited at that meeting. Note the trivial foundation of the attack upon credibility and note also that the identity of the papers was of no importance in the case and so stated (Rec. 770) in the record at the time. Nor was the trial court in any wise impressed (Rec. 772) with it. Impeachment can not be had on such utterly collateral and immaterial matter.

Nor is the criticism of Poole (Rep. Br. 11) correct that he couldn't remember if at San Francisco conference he was charged with having represented to Taylor at Denver meeting on April 2nd that the mine contained 60,000 tons. Poole flatly denies that at San Francisco conference any charge was made by any one that he had represented a 60,000 tonnage in mine on April 2nd. His testimony is that he is positive he never acquiesced (Rec. 510-511) in any statement at San Francisco conference that he had ever representd to Taylor that there were 60,000 tons ore in the mine, and in effect states merely that he can not be positive that mention of some tonnage may have been made by others at that conference. Murrish corroborates Poole (Rec. 636) that Poole stated at San

Francisco meeting that he never told Taylor there was 60,000 tons ore in mine.

Counsel say (Rep. Br. 11) that Murrish and Nenzel admitted that the 60,000 tons representation was made. This is far from correct. What Murrish and Nenzel did say (Rec. 610-634) is that at San Francisco meeting about June 4, 1919, Jackson in opening conversation stated, "You people told Mr. Taylor at Denver that there are 60,000 tons of ore in the mine". Murrish promptly challenged Jackson's statement (Rec. 635-636) " 'I never made such a statement' " and the minute I finished Mr. Nenzel got up and he said, " 'I never made such a statement as that either x-x-x I never made such a statement as that' ". Counsel question Poole's veracity (Rep. Br. 11-12) re no 60,000 tons representations being made by him at Denver meeting, because as counsel argue, in face of Taylor's letter suggesting Denver conference and requesting "exact data as to development work, assays, etc." so as to work up the tonnage and because of Taylor's statement to Poole at conference that he (Taylor) wanted deal on banking basis, and counsel conclude from this that Poole must have made representations to Taylor as to tonnage in mine.

But this argument and conclusion is wholly unfounded. We know (Rec. 801) that Taylor knew on March 27, 1919 that Poole hadn't been at mine

at all from January 27th, 1919, date of Bancroft's first examination. We know that on March 27, 1919 Taylor was informed by Nenzel that no "exact data" was then available. We know Taylor then knew no such data would or could be furnished for use at Denver conference on March 30th or for a week or so later. Nenzel's said letter of March 27th (Rec. 801) saying they had "no accurate survey of mine development" was obviously in answer to Taylor's letter of two days before on March 25th (Rec. 798) suggesting that Poole come to Denver "bringing exact data as to development, assays etc." Poole couldn't have made any representation as to tonnage because he had not been to the mine since Bancroft made his first examination, which was finished January 27, 1919, and Taylor knew then from Nenzel's said letter of March 27th that no accurate survey or data was then available. Also when Taylor made the suggestion March 25th that Poole come to Denver with exact data etc., Taylor expected to have Bancroft check up the whole business, because Taylor uses the words, "So that he (Poole) and Bancroft together can work up a definite tonnage." On March 28th at 12:10 P. M. Nenzel wired Taylor (Rec. 803) that on the following day he (Poole and Murrish) are leaving Lovelock for Denver. Later at 1:55 P. M. on same day Taylor wires (Rec. 891) to Tungsten Company that Bancroft can not be at Denver

conference, but adds that he (Taylor) will be glad to see Messrs. Poole, Murrish and Nenzel. This shows that the "exact data" was in the first place intended by Taylor **for use by Bancroft** and that Taylor was thereafter informed by Nenzel that no exact data or any dependable data was available, and then Taylor learned that Bancroft would not attend. Taylor then apparently concludes to meet with Poole, Murrish and Nenzel any how, but it is safe to assume that after Taylor learned from Bancroft that the latter could not attend, and after he learned from Nenzel that no accurate data as to mine development was available, that he conference, so far at least as Taylor was concerned was considered as a very general and informal matter. Taylor's evidence shows that he did not expect, and did not rely on any "exact data, assays etc." or on any representations by Poole, because he tells us (Rec. 118) that on **Sunday, March 30th,** which was before the actual conference was had, and admittedly two or three days before the day when Taylor claims Poole misrepresented, he (Taylor) "was willing in a general way **at that time to make a contract according to the terms that were finally arranged.** That is to say, Taylor's mental attitude towards the business was that without any data brought to Denver by Poole, and without any representations re 60,000 tons quantity or 1.75% quality,

Taylor on March 30th was willing to make the contract that was eventually made three days later. This simply means he was relying on Bancroft and a subsequent examination to be made by him.

And the very fact that according to Poole (Rec. 480-576-579) Taylor said at Denver conference that he (Taylor) "hoped to interest some New York Trust Company on a banking basis" is to our mind proof conclusive that, passing question of what Poole did or did not say as to tonnage and values, Taylor did not place any reliance whatsoever on what may have been said. If Taylor wanted to present deal in New York "on a banking basis" he surely knew he could not afford to accept **representations of vendors alone.**. Of course he intended from the start to have the services of Bancroft, a supposedly disinterested and admittedly competent engineer. And after Taylor told Poole that he "hoped to interest capital on a banking basis" there could be little or no occasion for Taylor or Poole to discuss tonnages or values except in the most general way, because nothing that either could say or do would put deal "on a banking basis". Hence Poole's testimony that no talk as to total tonnages or any definite values was had at Denver conference, is shown to be the obvious and natural thing under the circumstances.

Counsel attempt (Rep. Br. 13) to explain Taylor's apparent inconsistency in claiming Poole represent-

ed 60,000 tons and Taylor's alleged implicit reliance thereon, and Taylor thereafter representing to Crucible Steel Co. and to McKenna that the assured minimum tonnage was 43,000 tons, and counsel say that Taylor's every reference to tonnage other than 60,000 is related to a statement that the tonnage mentioned will secure the loan he was seeking to make.

But this does not explain at all, because no borrower seeking to make a loan fails to present proposition **as attractive as possible,** and sertainly 60,000 tons here is more attractive security than only 43,000 tons would be. Besides why did Taylor say 43,000 tons assured in presenting deal as safe investment to Crucible Steel Co. and to McKenna, when in his figures on April 2nd (Exhibit "B") (Rec. 897-899) he says investment safe with only 25,500 tons at one market, or 35,400 tons on another market? Presumably he used the market as then prevailing, as we find Taylor himself (Rec. 926-927) refers to the market as being $11.00 per unit. At this price very much less than 25,000 tons of 1.75% ore would be sufficient to show safe investment according to Taylor.

But a still more fatal objection to this "explanation" is that Taylor **did not take the 43,000 tons figure** on account of any belief or assumption on his part that it represented a safe investment, because about ten days **after** writing the said 43,000

tons assured minimum letter, Taylor and Thane prepare a prospectus, Exhibit "U", (Rec. 924) and in this Taylor says, the ore reserve is only 41,000 tons, and so far from even that amount being "assured" he says that the 41,000 tons is only **"indicated"**. The 41,000 tons only **"indicated"** certainly did not and could not relate to tonnage required to make a loan safe. Taylor in that same document, Exhibit "U", says (Rec. 928) that the "common shares are an attractive proposition". The whole document shows unmistakably that it was prepared for promotion purposes and not to borrow money, and Taylor elsewhere testifies that a number of copies of it were prepared and distributed among prospective investors.

Counsel say (Rep. Br. 14) that if Taylor wanted to fabricate and make his case correspond with figures presented by him to the Crucible Steel Co. and others, nothing could have been easier for him—the complaint and proof would then have been 40,000 tons and not 60,000 tons. Not so, because complaint and evidence would then have to be at least for 43,000 tons, and to square with the Exhibit "U" (Rec. 924) prospectus prepared by Taylor and Thane on train about April 27th, the complaint and evidence would have to be on basis of not to exceed 41,000 tons and that amount only "indicated" and to square with Exhibit "B" (Rec. 899) where Taylor computed tonnage at 25,-

500 to 35,400 tons, the complaint and evidence would again have to be changed.

TAYLOR IS NOT CORROBORATED

In reply brief, page 15, counsel say Taylor is corroborated by alleged fact that the defendants' mine map, Exhibit "Y" contains figures that are also found on plate 5 transferred to it from Exhibit "Y". The answer to this is that the figures on plate 5 are Taylor's and by comparison it will be found that the figures on blocks "M" and "N" on Exhibit "Y" **are also Taylor's.**

Counsel again revert (Rep. Br. 16) to the claim that Poole, Murrish and Nenzel at San Francisco were charged with having misrepresented mine conditions to Taylor re 60,000 tons, and counsel say the defendants "failed to deny" having so misrepresented. We do not understand why counsel make this statement. Poole says (Rec. 511-512) that he never acquiesced or agreed to any statement at San Francisco meeting that he had represented 60,000 tons to Taylor. Murrish says (Rec. 636) that Poole then and there denied ever having made any such statement, and that (Rec. 635):

> "I then took issue with Mr. Jackson and I said, " 'I made no such statement as that x-x-x I never made such a statement' "; that Nenzel then got up and he said," 'I never made such a statement as that either.' "

Murrish (Rec. 634) says that he never nodded his assent to Jackson's claim that defendants had so stated at Denver. Nenzel says (Rec. 610) he never nodded his assent and also that Poole stated at meeting (Rec. 613) he never made any such representation.

Counsel says (Rep. Br. 20) that the Court should bear in mind that Taylor's testimony re Poole's alleged 60,000 ton statements, were statements made to Taylor "by a mining expert in charge of operations at the mine, and who had brought, in response to Taylor's request, exact data as to development work, assays etc.". The fact is that Poole was not in charge of operations at the mine in any practical sense at all, as it is undisputed that **he had not even been at the mine** from time of Bancroft's first examination January 27th down to the very time of conference with Taylor at Denver, and further that Taylor at said conference **then and there knew** that Poole had not been at mine, and that no accurate survey had been made or any exact or dependable data obtained since January 27th.

TAYLOR RELIED ON BANCROFT

In reply brief, page 21, counsel argue that Taylor in entering upon contract, placed no reliance on Bancroft or upon examination to be subsequently made by him. At pages 24 to 26 of our first

brief herein, we covered this feature at length. The evidence shows among other things that on April 3rd, the **next day after contract was signed,** Taylor wired Bancroft (Rec. 272) and this fact and the contents of the wire were so significant as to lead the trial court to say (Rec. 275) that the telegram tended to show Taylor was relying on Bancroft as his expert. Poole tells us (Rec. 514) that Taylor told him at Denver conference that "he was going to rely absolutely on Mr. Bancroft". Nenzel says (Rec. 637) the matter of Bancroft making an examination was discussed by Poole and Taylor at that conference. The evidence, as well as the physical facts of the case, is overwhelmingly against Taylor's contention that he did not rely on Bancroft and an examination to be subsequently made by him (see evidence excerpted on point in our former brief, pages 24-31).

But counsel say (Rep. Br. 21) that Taylor expended substantial sums of money "before any **report** had been received from Bancroft". We say such expenditures are immaterial for any purpose and that only expenditures made **before Taylor determined to have Bancroft make examination,** could have any bearing on issue of reliance. Taylor tells us (Rec. 178-179, 226-289) that about May 1st, or a few days before, it was determined to have Bancroft examine the property. Elsewhere he puts it

May 9th (Rec. 223-224), but the record fails to show any expense incurred **before such determination,** whether we take the one date given by him or the other, except possibly a portion of expense of the Taylor trip with Thane to New York about April 27th, but inasmuch as Taylor admits (Rec. 173) he had other business taking him to New York about that time, it is not clear just how that expense item can equitably cut any figure in this case. Counsel's statement (Rep. Br. 21-22) that "much" of the alleged $6700.00 expenditures referred to, was made **before** Bancroft was **employed,** is simply confusing the issue. The point is that actual **employment** is not the thing; it is the **determination** or **decision** of Taylor to employ Bancroft or some other engineer, that is determinative here, because Taylor himself tells us (Rec. 179-180) that all expenses incurred by him after it was determined to have Bancroft examine the property, were in reliance on the results of Bancroft's examination. Exhibit 27 (Rec. 833) is an itemized statement of plaintiffs alleged expenses, and the earliest item is dated **May 16th** and of course admittedly some time **after** Taylor had determined to have Bancroft examine the property, and also **after** Bancroft had **actually been employed.** And when Taylor on cross-examination (Rec. 431) was asked to state any item of expense incurred by him prior to the determination to send Bancroft out, Taylor says, "I could not possibly do that",

and added, (Rec. 432) "I could not give an approximation thereof", and says, (Rec. 433) "I could not give you anything but a guess, I am sorry", and it finally simmered down that his best "guess" (Rec. 434) was $250.00, and then he adds (Rec. 436-437) he had other business in New York to consult Attorney Jackson about, and elsewhere (Rec. 173) he tells us he had other business taking him to New York at that time. Even prior to the April 2nd contract and at least as early as March 25, 1919, he had formed the definite purpose of going to New York in the latter part of April just as he did go on this trip, for on March 25th he writes Friedman, Exhibit 12, (Rec. 798):

> "I believe that on some modified form of option I could induce him (a bank president in New York) to go aheadwhen I go East again which will be the latter part of April."

Taylor's attorney Jackson was consulted by Taylor in May 1919 regarding two other contracts, wholly aside from the subject of contract Exhibit "C", and when Taylor was asked if the attorney's fee brought into this case was not paid on account of all three contracts, Taylor says (Rec. 437) "I could not tell you, sir". Note that he alleges and elsewhere testifies that the said attorney's fee item was wholly incurred in endeavoring to carry out this contract, Exhibit "C".

At page 22, reply brief, counsel say it is "undisputed" that Bancroft was not employed at in-

stance or initiative of Taylor. We deny this. True, Taylor so testified in effect, but according to Poole, Taylor stated at Denver conference he intended to have Bancroft examine the property, and Nenzel tells us he heard Taylor and Poole discuss the subject of Bancroft making an examination of the property. Admittedly Taylor wired Bancroft the very next day (Rec. 915) i. e. April 3rd, after Exhibit "C" was executed. It will be noted that in the copy of this telegram in evidence one inch thereof was torn out so we do not know all of its contents, but concerning this telegram the trial court used significant language, as follows:

> "I think it tends to show that the plaintiff was relying on this expert at the time the telegram was written." (Rec. 275).

Moreover Taylor himself tells us that before May 1st or May 9th, whichever date it was that it was finally determined to send Bancroft, the sending of another engineer had been discussed. But as we contend the question of as to whose initiative it was that Bancroft was brought in, is absolutely immaterial, because in addition to other matters discussed we have Taylor's statement (Rec. 225-226) that on train going east (which was about April 27th) Thane insisted on Bancroft checking up tonnage, values etc. **and that he (Taylor) "assented."**

LEGAL CONTENTIONS OF APPELLEES IN FORMER BRIEF NOT CONTROVERTED

Taylor's reply brief was filed and served after service of our former brief, as well as after the oral argument. In our former brief (Pages 52-55) and because of appellant's admission of a "sharp conflict in the testimony"; of their statement that "Taylor's case rests on the truth of his allegations" that "plaintiff now comes before this court taking issue with the trial court on these questions of fact" ets., we contended, citing authorities, that the finding of the trial court was unassailable. Appellant's reply brief is silent both as to the application of the rule as well as to the question of the authorities cited supporting the rule. So with our contention (Former Brief, p. 55-56) that to establish fraud, the proof must be clear, unequivocal and convincing.

More particularly significant is the silence of appellant in Reply Brief, as to our contention advanced in former brief (pages 60-62) that appellant's assignments of error are each and all fatally defective. In addition to the cases cited on this point by us in former brief, we wish to add:

Florida Central Co. v. Cutting (C. C. A.) 68 Fed., 586-587.

Hart v. Bowen (C. C. A.) 86 Fed., 877-882.

Appellant's failure to in any way reply to the

legal contentions would seem tantamount to an admission that such contentions are correct in law. There can hardly be any question of the rules of law so contended for being applicable to the facts. the rules of law so contended for being applicable to the facts.

Respectfully submitted,

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No. 3903

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

D. C. AUSTIN,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILED
AUG 30 1922
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CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of Washington, Northern Division.
May, 1921, Term.

No. 6186.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

D. C. AUSTIN,
Defendant.

Complaint.

Comes now the United States America, by Robert

*Page-number appearing at foot of page of original certified Transcript of Record.

C. Saunders, United States Attorney for the Western District of Washington, and Charlotte Kolmitz, Assistant United States Attorney for said district, and for cause of action against the above-named defendant D. C. Austin, respectfully shows the Court and alleges as follows:

I.

That "Cross Keys" is a steamship of American register plying in the trade between the Orient and the West Coast of the United States.

II.

That during the matters and times set forth in this complaint, D. C. Austin was, and is now, the master of the American steamship "Cross Keys."

III.

During the voyage complained of, the American steamship "Cross Keys" left the Orient, arriving at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, on the 19th day of May, 1921.

IV.

After arrival within the waters of the United States and within this district and division, the said defendant D. C. Austin, as master, as aforesaid, of the said American steamship "Cross Keys" filed with the Collector of Customs of the [2] United States, at the port of Seattle, Washington, certain manifests and store lists which were then and there claimed and represented by said master and purported to be true and correct manifests and store lists of all merchandise at that time on board said steamship. Thereafter, at

the port of Seattle, the customs officers of the United States found upon said steamship the following described merchandise of the following value, to wit:

21 Qts. Distilled Spirits
2 " Wine
1 Pint Liquor—Total value $73.00

making a total valuation of said merchandise in the sum of Seventy-three Dollars ($73.00); that said merchandise and no part thereof was shown, included or described in the said manifests or store lists, or in any of them.

V.

That said merchandise herein referred to and described in paragraph V hereof, was brought into the United States in the said steamship "Cross Keys" from a foreign place, to wit, from the Orient, and was not included or described in any manifest or store list hereinabove referred to and for which said merchandise there was no manifest or store list on board said steamship agreeing therewith.

VI.

A complaint having been made to the Collector of Customs of the United States at the Port of Seattle, Washington, by the Inspector discovering the merchandise hereinabove described, upon due notice the said Collector of Customs heretofore, on to wit, the 19th day of May, 1921, assessed against and imposed upon the said defendant D. C. Austin, master of the said American steamship "Cross Keys," a penalty equal to the value of such merchandise, that is to say, a penalty in the sum of Seventy-three Dollars ($73.00). [3]

VII.

That the said defendant has failed and refused and does fail and refuse to pay said sum of Seventy-three Dollars ($73.00) imposed and assessed as a penalty, as aforesaid, although demand therefor has heretofore been made by the said Collector of Customs.

VIII.

That by reason of the matters and facts herein set forth, the said defendant D. C. Austin is liable to the United States of America to a penalty in the sum of Seventy-three Dollars ($73.00).

WHEREFORE plaintiff prays that it do have and recover of and from the said defendant the said sum of Seventy-Three Dollars ($73.00), together with all of its statutory and other costs and expenses incurred in this action.

ROBERT C. SAUNDERS,
United States Attorney.
CHARLOTTE KOLMITZ,
Assistant United States Attorney.

United States of America,
Western District of Washington,
Northern Division,—ss.

Charlotte Kolmitz, being first duly sworn, on her oath deposes and says: That she is Assistant United States Attorney for the Western District of Washington; that she has read the foregoing complaint, knows the contents thereof, and that the same is true as she verily believes.

CHARLOTTE KOLMITZ.

Subscribed and sworn to before me this 26th day of July, 1921.

[Seal] FRANK L. CROSBY, Jr.,
Deputy Clerk U. S. District Court.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 27, 1921. F. M. Harshberger, Clerk. By Frank L. Crosby, Jr., Deputy Clerk. [4]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

D. C. AUSTIN,
Defendant.

Demurrer to Complaint.

Comes now the defendant by his attorneys, Grosscup & Morrow, and demurs to the plaintiff's complaint on the ground and for the reason that same does not state facts sufficient to constitute a cause of action.

GROSSCUP & MORROW,
Attorneys for Defendant,
3201-3203 L. C. Smith Building, Seattle, Washington.

Due service of the within and foregoing demurrer by the receipt of a true copy thereof, together with

true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 24th day of October, 1921.

THOS. P. REVELLE,
By E. D. DUTTON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [5]

United States District Court, Western District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

Hearing on Demurrer to Complaint.

Now on this 19th day of June, 1922, the above demurrer to complaint comes on for hearing and is sustained with exceptions asked and allowed.

Journal No. 10, page 225. [6]

United States District Court, Western District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

Judgment.

This matter having come on regularly for hearing on the 19th day of June, 1922, upon the demurrer of the defendant to the complaint of the plaintiff, and after argument of counsel for the respective parties, the Court being fully advised in the premises and having sustained said demurrer to said complaint;

And the plaintiff having elected to stand upon its complaint and refusing to plead further,—

Now, therefore, it is hereby ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by reason of its alleged cause of action herein as against the defendant, and that this action as against the said defendant be, and the same is hereby, dismissed.

To all of which plaintiff excepts and its exceptions are allowed.

Done in open court this 8th day of July, 1922.

EDWARD E. CUSHMAN,

Judge.

O. K.

GROSSCUP & MORROW.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 8, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Received a copy of the within judgment this 7th day of July, 1922.

GROSSCUP & MORROW,
Attorneys for Defendant. [7]

United States District Court, Western District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

D. C. AUSTIN,
Defendant.

Petition for Writ of Error.

Comes now the United States of America, plaintiff in the above-entitled cause, and feeling aggrieved by the final judgment herein entered on the 8th day of July, 1922, petitions this Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and according to the laws of the United States in that behalf made and provided, there to correct certain errors committed to the prejudice of the said plaintiff, which more in detail appear from the assignment of errors filed with this petition, and prays that a writ

of error issue out of said court of appeals, for the correction of the error so complained of, and that the transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to said court of appeals.

THOS. P. REVELLE,
United States Attorney.
JUDSON F. FALKNOR,
Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy Clerk. [8]

United States District Court, Western District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

D. C. AUSTIN,
Defendant.

Assignment of Errors.

Comes now the plaintiff, United States of America, by and through Thomas P. Revelle, United States District Attorney, and files the following assignment of errors upon which he will rely upon his appeal from the judgment made by this Honorable Court

on the 8th day of July, 1922, in the above-entitled cause.

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the demurrer of the defendant to the complaint of the plaintiff herein.

II.

That the said District Court erred in dismissing said action.

WHEREFORE, plaintiff prays that said judgment be reversed and that said District Court for the Western District of Washington be directed to reverse and set aside said judgment, and that plaintiff be granted a new trial.

THOS. P. REVELLE,
United States Attorney.
JUDSON F. FALKNOR,
Assistant United States Attorney.

Received a copy of the within assignment of error this 10th day of July, 1922.

GROSSCUP & MORROW,
Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy Clerk. [9]

United States District Court, Western District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

Order Allowing Writ of Error.

Comes the plaintiff, United States of America, by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error on assignment of error intended to be urged, and praying also that a transcript of record and proceedings, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings be had as may be proper in the premises.

Now, in consideration thereof, the Court does hereby allow the writ of error prayed for.

Dated this 11th day of July, 1922.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

United States District Court, Western District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

Admission of Service of Petition for Writ of Error, Order Allowing Writ of Error, and Praecipe for Transcript of Record.

Due, timely and regular service, together with the receipt of copies thereof, of the plaintiff's petition for writ of error, order allowing writ of error, and praecipe for transcript of record, is hereby admitted this 10th day of July, 1922.

GROSSCUP & MORROW,
Attorneys for Defendant.

Received a copy of the within this 10th day of July, 1922.

GROSSCUP & MORROW,
Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

United States District Court, Western District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-Entitled Court:

You will please prepare a typewritten transcript of record in the above-entitled cause on writ of error, and file the same in the United States Circuit Court of Appeals for the Ninth Circuit, said record to comprise the following papers:

1. Complaint.
2. Demurrer.
3. Clerk's entry sustaining demurrer.
4. Judgment.
5. Petition for writ of error.
6. Assignment of errors.
7. Order allowing writ of error.
8. Admission of service.
9. This praecipe.

THOS. P. REVELLE,
United States Attorney.
JUDSON F. FALKNOR,
Assistant United States Attorney. [12]

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing, as provided under rule 105 of this Court.

THOS. P. REVELLE,
United States Attorney,
JUDSON F. FALKNOR,
Assistant United States Attorney,
Attorneys for Plaintiff.

We hereby acknowledge service of a copy of the foregoing praecipe, waive the right to request the insertion of any other matters than those incorporated in the foregoing praecipe, and stipulate that the proceedings, papers, orders and documents included in said praecipe constitute a full and sufficient record upon writ of error.

GROSSCUP & MORROW,
Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

D. C. AUSTIN,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 13, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals [14] for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 25 folios at 15c. $3,75
Certificate of Clerk to Transcript of Record, 4 folios at 15c .. .. .60
Seal to said Certificates ..... .20

Total $4.55

I hereby certify that the above cost for preparing and certifying record, amounting to $4.55, will be included in my quarterly account to the Government of fees and emoluments for the quarter ending September 30, 1922.

I further certify that I hereto attach and herewith transmit the original writ of error, original citation and original acceptance of service of writ of error and citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 25th day of July, 1922.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [15]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. .....

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

D. C. AUSTIN,
Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before the Honorable Edward E. Cushman, between United States of America, the plaintiff in error, and D. C. Austin, the defendant in error, a manifest error hath happened to the prejudice and great damage of the United States of America, the plaintiff in error, as by its complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so that you have the same at said city of San Fran- [16] cisco, State of California, within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States of America, should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 11th day of July, 1922, and the year of the Independ-

ence of the United States one hundred and forty-fifth.

[Seal] F. M. HARSHBERGER,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division,

By S. E. LEITCH,

Deputy.

Acceptance of service of within writ of error acknowledged this 10th day of July, 1922.

GROSSCUP & MORROW,

Attorneys for Defendant in Error. [17]

[Endorsed]: No. ——. U. S. Circuit Court of Appeals, 9th Circuit, San Francisco. United States of America, Plaintiff in Error, vs. D. C. Austin, Defendant in Error. Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. .....

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

D. C. AUSTIN,

Defendant in Error.

Citation on Writ of Error.

The United States of America,—ss.

The President of the United States of America, to D. C. Austin, Defendant in Error, and to Grosscup & Morrow, Attorneys for Defendant in Error, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff in error, and D. C. Austin is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 11th day of July, 1922.

[Seal] EDWARD E. CUSHMAN,
United States District Judge.

Attest:

F. M. HARSHBERGER,
Clerk of United States District Court, Western District of Washington, Northern Division.
By S. E. LEITCH,
Deputy Clerk. [18]

Acceptance of service of within citation on writ of error acknowledged this 11th day of July, 1922.

GROSSCUP & MORROW,

Attorneys for Defendant in Error.

[Endorsed]: No. ——. U. S. Circuit Court of Appeals, 9th Circuit, San Francisco. United States of America, Plaintiff in Error, vs. D. C. Austin, Defendant in Error. Citation on Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

[Endorsed]: No. 3903. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. D. C. Austin, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

NO. 3903

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

D. C. AUSTIN, *Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFF IN ERROR

THOMAS P. REVELLE,
United States Attorney.
JUDSON F. FALKNOR,
Assistant United States Attorney.

Office and Postoffice Address: 310 Federal Building, Seattle, Washington.

SHERMAN PRINTING AND BINDING CO., SEATTLE, WASH.

Filed
AUG 25 1922

NO. 3903

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

D. C. AUSTIN, *Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

The complaint alleges in substance that the defendant in error was Master of the American steamship "Cross Keys." That on or about the 19th day of May, 1922, the said steamship "Cross Keys" arrived at the Port of Seattle in the Northern Division of the Western District of Washington, from a foreign port; that after the arrival of the said steamship "Cross Keys" the defendant, as Master of said vessel, filed with the Collector of Customs at the

Port of Seattle certain manifests and store lists, purporting to be complete and correct manifests and store lists of merchandise on board said vessel; that thereafter, at the Port of Seattle, Customs Inspectors of the United States found on board of said vessel certain liquor which had not been manifested and which did not appear on the store lists of said vessel, and that thereafter a penalty under section 2809, Revised Statutes, equal to the appraised value of the liquor, to-wit, $73.00, was assessed against said defendant in error by the Collector of Customs; that, upon demand, the defendant in error refused to pay this sum. The prayer of the complaint asked judgment against the defendant in the sum of $73.00, being the penalty theretofore assessed by the Collector of Customs for the failure of the Master to manifest the liquor. To the complaint the defendant in error filed his demurrer upon the ground and for the reason that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the district court and the Government electing to stand on its complaint and refusing to plead further judgment of dismissal was thereafter entered.

This writ of error is prosecuted from said judgment.

ARGUMENT.

The only question involved is the correctness of the ruling of the trial court in sustaining the demurrer of the defendant in error and dismissing the action. Section 2809, Revised Statutes, reads as follows:

> "If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited."

The question involved in this case is identical with the issues presented to the court in the case of *United States v. Olaf O. Hana*, 276 Fed. 817, where in an identical case this court affirmed the ruling of the trial court in sustaining a demurrer to a similar complaint. Upon instructions from the Attorney General, this matter is again presented to this court for consideration for the reason that it is believed that all of the authorities touching the question were not presented to the court at the time of the submission of the *Olaf O. Hana* case. With the

Court's indulgence, therefore, it is deemed advisable to further present to the court certain authorities not urged by the Government at the hearing of the other cause and which are believed to have a decided bearing upon the issues presented.

(1) The first question, of course, involved is whether or not intoxicating liquor falls within the meaning of the word "merchandise" as used in section 2809, Revised Statutes, and the case further calls for a construction of section 2766, Revised Statutes, defining "merchandise" and a construction in particular of the words "capable of being imported," the court holding in *United States v. Sischo*, 270 Fed. 958, and, in substance, to the same effect in the *Olaf O. Hana* case, that those words must be construed to mean "legally capable of being imported."

The authorities below are cited as supporting the Government's contention that the fact that the importation of an article which would otherwise be undoubtedly "merchandise" is prohibited, and that this prohibition is sanctioned by a penalty upon the person importing it or selling it after importation, cannot change the actual nature of the article itself, which is the important thing in view of the statutes.

If it be said that the articles whose importation is prohibited are not on that account "merchandise," it would seem that the principle would have to be extended also to the importation of articles without the payment of duty thereon, or without complying with other provisions of the customs revenue laws. It does not seem that it could possibly be said that articles which were fraudulently brought into the country without the payment of duties were not "merchandise" on account of their unlawful importation, and yet the bringing of them in in that manner is punished and subjects the goods to forfeiture. They are not "legally capable of being imported" any more than articles whose importation is prohibited, since they can only be legally imported by the payment of the duties, a condition which has not been performed.

Attention is called at this point to what seems to the Government to be a distinction between the issues involved in the case of *United States v. Sischo, supra,* and the instant case; and while the court did not overlook this contention in its decision in the *Olaf O. Hana* case, we believe that the contention is entitled to further consideration by the court. The importation of intoxicating liquor, unlike smoking opium, is not absolutely prohibited but may be im-

ported, and brought into the country under the mode and procedure prescribed in the National Prohibition Act. Not only must the duties be paid upon the liquor at the time of its importation, but the proper permits must be obtained for the importation. It is submitted that in view of the procedure adopted in the Prohibition Act for the legal importation of liquor, that it must be held to be "merchandise" in view of its capacity for legal importation. There can be no question but that the failure to pay duty upon goods which can be legitimately imported would not be held to take from those goods their character as "merchandise," and similarly that the failure to comply with the other step necessary, that is, to follow the procedure outlined in the Prohibition Act with relation to the securing of a permit, cannot be said to render the intoxicating liquor contraband so as to be excluded from the term "merchandise." The following authorities are cited to the effect that prohibited articles are none the less merchandise, but which authorities do not appear to be contained in the brief of the Government in the *Olaf O. Hana* case.

Section 3082 of the Revised Statutes provides that if any person shall fraudulently or knowingly import or bring into the United States any mer-

chandise contrary to law, he shall be punished and the merchandise forfeited.

In *United States v. Thomas*, 4 Ben. 370, 373-375, Fed. Cas. No. 16473, it was held that this section did not apply at all to goods imported without the payment of duties, but applied only to goods imported in a manner or form contrary to law or whose importation was altogether forbidden, thus expressly holding that goods whose importation was forbidden were nevertheless merchandise within the meaning of section 3082, Revised Statutes. A ruling to precisely the same effect was made in *United States v. Claflin*, 13 Blatch, 178, 186, Fed. Cas. No. 14798. In *United States v. Kee Ho*, 33 Fed. 333, 335, Judge Deady said of section 3082, Revised Statutes:

> "The section of the statute under which this indictment is drawn is intended, as the title of the act from which it is compiled indicates, to prevent smuggling, or clandestine introduction of goods into the United States without passing them through the customhouse, and with intent to defraud the revenue of the United States. But its language is broad enough to include, and does include, every case or form of illegal importation, even where the intent to avoid the payment of duties does not exist, as the bringing in of prohibited goods or goods packed in prohibited methods."

In *Estes v. United States*, 227 Fed. 818, it appeared that the Secretary of Agriculture had made a regulation, under the animal quarantine act, to the effect that no cattle should be imported into the United States from the Republic of Mexico without inspection by an inspector of the Bureau of Animal Industry and a finding that they were free from disease. The defendants had imported certain cattle into this country (such cattle not being dutiable under the customs laws) without the requisite inspection, and they were indicted for a violation of section 3100, Revised Statutes, which prohibits the importation of merchandise and all other articles without inspection by an officer of the customs, and of section 3082, Revised Statutes, referred to above. It was held that both sections had been violated, that is, that such cattle, although prohibited from importation into this country without inspection under the quarantine act, were nevertheless "merchandise" imported into this country, if the owners thereof succeeded in avoiding the quarantine inspectors.

In *Daigle v. United States*, 237 Fed. 159, 163, 165, it appeared that the Secretary of Agriculture had promulgated a quarantine against potatoes from Canada, and certain potatoes were libeled for a violation of section 3082, Revised Statutes,

and 3100, Revised Statutes, referred to above, in that they had been imported from Canada, contrary to law, and without inspection by the customs inspectors. The Court of Appeals for the First Circuit held that, if the libel had alleged that the goods had been knowingly brought into the United States contrary to law because their importation was prohibited under the order of the Secretary of Agriculture, there would be little doubt that the potatoes would be subject to seizure and condemnation under section 3082, Revised Statutes, holding, however, that this section was not applicable on account of the lack of the necessary allegations in the libel. The Court of Appeals went on to hold that the importation, nevertheless, under the circumstances, was a violation of section 3100, Revised Statutes, the court saying:

> But the contention is made that the potatoes here in question were not subjects of import even as nondutiable articles, for their importation was prohibited under the plant quarantine act and the order of the Secretary of Agriculture, and the question is whether the provisions of section 3100 apply to merchandise the importation of which is prohibited, and require that it, on being brought "into the United States from any contiguous foreign country, * * * shall be unladen in the presence of,

and be inspected by, an inspector or other officer of * * * customs at the first port of entry or customshouse in the United States where the same shall arrive." Although merchandise, the importation of which is expressly prohibited can not lawfully be imported, it does not follow that its introduction into the country will not also be contrary to the provisions of section 3100 if not submitted for inspection, so that it may be excluded. The provisions of section 3100 are broad in their terms. They contemplate that "all merchandise, and all baggage and effects of passengers, and all other articles imported into the United States from any contiguous foreign country" shall be subjected to inspection at the first port of entry or customhouse in the United States where the same shall arrive, with the single exception provided for in section 3102 (Comp. St. 1913, sec 5814), which has nothing to do with this case.

We are therefore of the opinion that all merchandise introduced into this country from Canada, whether subject to duty, free from duty, or the importation of which is prohibited, is introduced in violation of law if not submitted for inspection as required by section 3100, and that the District Court was right in ruling that the plant quarantine act and the order of the Secretary of Agriculture did not constitute a defense to the libel as applied to the fourth count.

In *Feathers of Wild Birds v. United States*, 267

Fed. 964, section 3082, Revised Statutes, was expressly applied to articles whose importation into this country is absolutely prohibited, the Court of Appeals for the Second Circuit saying:

> We think that, where goods forbidden of importation are physically brought into the country as such prohibited articles, they are in fact imported within the meaning of the act just as truly as there may be an importation of lawful goods which may be imported contrary to law by failure to comply with the customs statute.

The most important decision, however, upon the subject, and one which seems to have a decided bearing on the case at bar in all its aspects, is the unanimous opinion of the Supreme Court, delivered by Mr. Justice Story, in the case of *Harford v. United States*, 8 Cranch, 109. As the opinion is short, it is quoted in full:

> The principal question in this case is whether goods and merchandise, the importation of which into the United States was prohibited by the Act of 18th of April, 1806, vol. 8, p. 80, were within the purview of the 50th section of the collection act of 2d of March, 1799, vol. 4, p. 360, so that the unlading of them without a permit, etc., was an offence subjecting them to forfeiture.
>
> It has been contended on behalf of the claimant that they were not within the purview of

the 50th section, because that section applies only to goods, wares, and merchandise, the importation of which is lawful. To this construction the court can not yield assent. The language of the 50th section is, that "no goods, wares, or merchandise, etc., shall be unladen, etc., without a permit;" it is therefore broad enough to cover all goods, whether lawful or unlawful. The case, being then within the letter, can be extracted from forfeiture only by showing that it is not within the spirit of the section. To us it seems clear that the case is within the policy and mischief of the collection act, since the necessity of a permit is some check upon unlawful importations, and is one reason why it is required. The act of 1806 does not profess to repeal the 50th section of the collection act as to the prohibited goods, and a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable. No such manifest repugnance appears to the court. The provisions may well stand together and indeed serve as mutual aids.

In fact the very point now presented was decided by this court in the case of *Locke, claimant, v. The United States*, at February term, 1813.

It will be seen that the court in this opinion distinctly holds that articles, whose importation into this country is absolutely prohibited, are, nevertheless, "goods, wares and merchandise" within the

meaning of the customs revenue acts. It is submitted, therefore, that both on principle and authority the word "merchandise" in section 2809, Revised Statutes, cannot be limited, either by reason of its ordinary meaning, or by reason of the provisions of section 2766, Revised Statutes, so as to exclude from its scope articles whose importation into this country is absolutely prohibited and *a fortiori*, articles, which, by express provisions of the law, are legally capable of being imported.

(2) A further question would seem to be involved in the instant case, and that is whether or not, where articles whose importation into this country is absolutely prohibited, or whose importation is restricted, are nevertheless physically brought within the territorial limits of this country, they can be said to have been brought into the country within the meaning of section 2809, Revised Statutes.

The statutes generally use the word "import," and it would seem that clearly the words "brought into" are added to the word "imported" so as to broaden its meaning and include cases where a technical importation might be said not to have taken place. The word "importation" as used in the customs revenue laws is thus defined by the

United States Supreme Court in *Arnold v. United States*, 9 Cranch 104, 120:

> It is further contended that the importation was complete by the arrival of the vessel within the jurisdictional limits of the United States on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry.

It will be observed that nothing is said in this decision as to the character of the articles being material, that is, whether they are articles whose importation is forbidden or restricted, or not.

In the cases referred to above, namely, *United States v. Thomas*, *United States v. Claflin*, and *United States v. Kee Ho*, it was held that there could be an "importation" of prohibited articles within the limited meaning of that word as used in the customs revenue statutes. In the case of *The Schooner Boston*, 1 Gallison, 239, Fed. Cas. No. 1670, it appeared that the schooner came into the port of Boston having on board certain goods whose importation into this country was absolutely prohibited under the President's proclamation made pursuant to the embargo act. It was claimed that

the vessel had come into the port of Boston merely to find out whether the goods could be lawfully brought into this country or not and that, after finding that they could not be lawfully imported, the destination of the vessel had been changed to a foreign country. Mr. Justice Story held, nevertheless, that this was an importation into the United States, and that the vessel and the cargo were subject to forfeiture. After pointing out expressly that the importation of these goods was absolutely prohibited, Justice Story said:

> The cargo was taken on board with the intention to be imported, and was actually imported into the United States.

If the physical bringing into this country of prohibited articles may be (as the authorities above show it is) an "importation," it follows *a fortiori* that such a physical transportation of the prohibited articles into this country would constitute a bringing in of them within the meaning of section 2809, Revised Statutes. The words "bring into" or "brought into" are evidently broader words than "import into," and must have been used by Congress for the very purpose of covering the illegal transportation of goods into this country where a technical importation into a port of entry has not taken place.

(3) The third question involved in the case at bar would seem to be whether there is any duty to manifest prohibited articles within the meaning of section 2809, Revised Statutes. It is submitted that here, too, the manifesting of prohibited articles is within both the letter and spirit of section 2809, Revised Statutes.

The word "manifest" is apparently a somewhat modern one. In Lord Hale's Treatise Concerning the Customs (Hargrave's Law Tracts, pp. 219, 220), it is said that the master is obliged to give an account to the revenue authorities of the goods under his charge, and to make a just and true entry of certain matters, which, it seems to be supposed, he will obtain from the bills-of-lading. In the Oxford dictionary the following definition of the word "manifest" is given:

> The list of the ship's cargo, signed by the master, for the information and use of the officers of customs.

The first citation of the word, however, with this meaning appears to be in 1744, and an earlier citation of it in 1706 reads as though the manifest was merely a draft of the cargo, showing what is due for freight. At any rate, the modern meaning of it, as used in the customs revenue acts, is undoubtedly

that given in the Oxford dictionary, viz., a list of the ship's cargo for the information and use of the officers of customs.

The contents of the manifest are prescribed in great detail in section 2807 of the Revised Statutes as amended. The third paragraph (being the important one to the case at bar) provides that the manifest shall contain

> "A just and particular account of all the merchandise, so laden on board" (that is, laden on board in a foreign port), "whether in packages or stowed loose, of any kind or nature whatever."

There is nothing in this language to indicate articles whose importation is prohibited are not to be included. Indeed, it seems evident that they are included within the letter of the statute which includes all merchandise of every kind whatsoever, and makes no exceptions. It should be observed also that the manifest must contain an account of the sea stores on board the vessel, although such articles are not merchandise, are not imported, and are not subject to duties.

It is submitted that articles whose importation into this country is prohibited are within the letter of sections 2806, 2807 and 2809, Revised Statutes,

and must be included in the manifest as prescribed by those sections unless some strong reason exists to take them out of the spirit of the statute, so that to apply the statute to them would work an absurdity or an injustice.

It is to be observed that the manifest is prescribed by the statutes for the information and use of the officers of the customs. If the duties of such officers were confined solely to the collection of revenues upon importations, there would be great force in the argument that to require the manifest to include prohibited articles would be an injustice and an absurdity. The duties of customs officers, however, are not so limited. In fact, they are the general guardians and custodians of the boundary lines of this country, and it is part of their duty to protect those boundaries from transportation across them of any articles brought in in a manner prohibited by law, no matter whether the illegality consist in a violation of the customs laws or not. This can be clearly seen from the fact that sections 4197, 4198, 4199 and 4200 of the Revised Statutes expressly require manifests of outward bound cargoes. Evidently this requirement can have nothing to do with the collection of customs duties and shows clearly that Congress intended that the customs

officers should have complete information for all purposes of every article of merchandise contained in vessels coming to or going from this country.

Consequently, this has been in effect the holdings of the courts. In *United States v.* 50 *Waltham Watch Movements*, 139 Fed. 291, 299, 300, it was held that goods which were not dutiable must, nevertheless, be declared to the customs officers. The same rulings were in effect made in *United States v. Burnham*, 1 Mason 57, 63; in *Jackson v. United States*, 4 Mason 186, 190; and in *United States v.* 20 *Cases of Matches*, 2 Biss. 47, 50, it was held that a permit was necessary for unloading goods transported from one place in the United States to another but through a foreign country, although the goods were not subject to duty. In *Goldman v. United States*, 263 Fed. 340, 343, the court said, in making a similar ruling to the effect that nondutiable goods, nevertheless, could not be unladen without a permit:

> We think section 3082 was not intended to be limited to cases of smuggling in the sense of introducing dutiable merchandise without paying and with the intent to avoid paying the duty on it. The proper administration of the custom laws requires that it be given a wider scope. It is important, in order to enforce the collection of duties, to establish many regula-

> tions relating to the introduction of merchandise into the country, other than the ultimate one requiring the payment of duties. These are auxiliary regulations and can only be enforced by the imposition of penalties and punishment for their infraction. It is necessary not only to establish them, but to make disobedience of them criminal.

An even more direct authority is the case of *Daigle v. United States*, 237 Fed. 159, 163, 165, referred to above, where it was held that section 3100, Revised Statutes, which provides that all goods imported into the United States from any contiguous foreign country shall be unladen in the presence of and be inspected by an officer in the customs applied to articles whose importation into this country was prohibited. It seems impossible to distinguish between the requirement of a manifest under section 2809, Revised Statutes, and the requirement of inspection under section 3100, Revised Statutes.

But the Government relies mostly on this phase of the case, as well as on the other phases of it, on the decision of the Supreme Court in *Hartford v. United States*, 8 Cranch 109, referred to above. In that case it was held that articles whose importation was prohibited were subject to the provisions

of the customs laws prohibiting an unloading without a permit. Every reason which can be urged against the requirement of a manifest as to prohibited articles could be equally well used against the requirement of a permit for unloading. In the latter case it could be equally well said that the master could not be expected to ask a permit to unload goods whose importation was prohibited, and that to require him to do so would be to require him to convict himself of an offense. Nevertheless, the Supreme Court held that the requirement was necessary in the case of prohibited articles as in the case of other articles for the reason that the customs officers were entitled to full information in regard to all articles brought into this country as a matter of fact whatever their nature might be, or whether their importation was permitted or prohibited.

It is difficult to see why, if the manifest be of no importance as to prohibited articles, it is not equally of no importance in regard to articles imported into this country without the payment of duties which have legally accrued upon them. Suppose that the defendant, in the case at bar, instead of intending to bring into this country for sale prohibited articles, intended to smuggle in articles whose importation was permitted, without the payment of

the duty thereon. It would seem that in the latter case, just as much as in the former, he would have no inclination to manifest the articles, and, if he did manifest them, his very act of so doing would tend to convict him of the crime of smuggling. If, therefore, it be unnecessary for him to manifest prohibited articles, it is difficult to see why it should be necessary for him to manifest articles which he intends to smuggle into this country. Yet, of course, his duty to manifest in the latter case is entirely clear and would, no doubt, be admitted by everyone. The argument on the other side appears to be that, since the manifest is required for the purpose of preventing the importation into this country contrary to law of merchandise, therefore the manifest should only include those articles whose importation is intended to be lawful. The object of section 2809 is to penalize the bringing in of articles to this country contrary to law by providing that, if they do not appear upon the manifest, they shall be forfeited and the master of the vessel shall pay a penalty. It is their absence from the manifest which is important, not their presence on it. The duty to manifest everything is placed upon the master, and the dereliction of that duty is made punishable, no matter that it is inconceiv-

able that the master, under the circumstances, would perform the duty.

It is, therefore, submitted that upon the authorities cited, especially those from the Supreme Court, that the complaint does state a cause of action, that the court was in error in sustaining a demurrer and that the judgment of the trial court in dismissing the action should be reversed, with instructions to overrule the demurrer.

Respectfully submitted,

THOMAS P. REVELLE,
United States Attorney,
JUDSON F. FALKNOR,
Assistant United States Attorney.

No. 3903

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

v.

D. C. AUSTIN, *Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

Brief of Defendant in Error

W. A. JOHNSON

GROSSCUP & MORROW
Counsel for Defendant in Error

Office and Postoffice Address: 421-5 L. C. Smith Building, Seattle, Washington.

FILED
SEP 11 1922
F. D. MONCKTON,

No. 3903

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W. A. JOHNSON

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HON. EDWARD E. CUSHMAN, *Judge*

Brief of Defendant in Error

STATEMENT OF THE CASE

The plaintiff in error has correctly stated the facts. They are simply the pleadings in the case, and, about which, of course, there can be no dispute.

ARGUMENT.

We have read the plaintiff's brief with much interest and must congratulate counsel upon their

persistence and diligence. The ingenuity of the plaintiff's argument and the nature of the decisions cited in support, convince us that the plaintiff is hard pressed for a legitimate reason to present this case to the court and to fly in the face of *stare decisis*.

As a matter of fact, and to follow the plaintiff in going outside the record, we understand the Attorney General's department, for some reason, failed to perfect its appeal from this Court to the United States Supreme Court in the case of *United States* v. *Hana*, 276 Fed. 817, and, desiring to have this question passed upon by the highest tribunal in the land, has selected the defendant herein as its beast of burden to carry it thence.

A lengthy brief might be written by us on this subject but we would deem it impertinent to do so, in view of the elaborate and unanswerable opinion of this Court in the case of *United States* v. *Sischo*, 270 Fed. 958. To our minds the logic of the Court's reasoning in the above cited cases more than overcomes this latest effort of the plaintiff and we are content to rest thereon without further argument.

We, therefore, ask that the judgment of the lower Court be affirmed.

Respectfully submitted,

W. A. JOHNSON

GROSSCUP & MORROW,

Counsel for Defendant in Error.

No. 3905 9

United States Circuit Court of Appeals

For the Ninth Circuit

A. MAGNUS SONS COMPANY, a corporation,
Plaintiff in Error,

vs.

ADAM OREY and W. J. BISHOP,
Defendants in Error.

TRANSCRIPT OF RECORD

On Writ of Error to the District Court of the United States for the District of Oregon, Honorable Charles E. Wolverton, District Judge.

FILED
AUG 3 - 1922
F. D. MONCKTON,
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(In conformity with stipulation of counsel printed at page 130 of this Transcript the caption, title, clerk's endorsements, and other formal matters appearing in the original papers, not material to this hearing, are omitted herefrom.)

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No.....

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TRANSCRIPT OF RECORD

On Writ of Error to the District Court of the United States for the District of Oregon, Honorable Charles E. Wolverton, District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

A. MAGNUS SONS COMPANY, a corporation,
Plaintiff in Error,
vs.
ADAM OREY and W. J. BISHOP,
Defendants in Error.

BE IT REMEMBERED, that on the 19th day of March, 1920, there was filed in the above entitled Court and cause the following

COMPLAINT

Plaintiff complains and for cause of action against the defendants alleges:

I.

That at all times herein mentioned plaintiff was and now is a private corporation organized and existing under the laws of the State of Illinois, and has its principal office and place of business in the City of Chicago, in Cook County, in said State, and is a citizen of and resides in said State of Illinois.

II.

That at all times herein mentioned defendants were and now are citizens and residents of the State of Oregon, and defendant, Adam Orey, resides in Marion County in said state, and defendant, W. J. Bishop, resides in Multnomah County in said state.

III.

That the matter in controversy in this action exceeds, exclusive of interest and costs, the sum of $3000.

IV.

That on or about the 26th day of January, 1917, plaintiff and defendants entered into a contract wherein and whereby, amongst other things, defendants sold to plaintiff sixty thousand pounds of hops of the crop to be raised and grown by defendants in the year 1919 on the lands therein described, and to deliver said hops in said year at boat landing, depot or on board cars free of charge at such time between the 1st and 31st day of October of said year as the plaintiff may direct; that in and by said contract plaintiff agreed to buy said hops and to advance to defendants $1800 on or about April 1, 1919, and a like amount for picking purposes on or about September 1, 1919, and the remainder due on said hops at the contract price of eleven and one-half (11½) cents per pound upon delivery and acceptance of said hops. That a copy of said contract is hereto annexed, marked Exhibit A, and is hereby made a part of this complaint.

V.

That thereafter on or about March 13, 1919, plaintiff at the request of defendants agreed to increase the contract price to be paid for said hops to sixteen cents per pound.

VI.

That plaintiff in all respects performed all of the terms of said contract on its part to be performed, and on March 29, 1919, advanced to defendants $1800, and on September 4, 1919, $3000 on the purchase price of said hops.

VII.

That defendants raised, grew and harvested 40,000 pounds of hops on said lands in the year 1919, instead of 60,000 pounds, and on or about October 16, 1919, delivered to plaintiff only 29,592 pounds of said crop for which plaintiff paid defendants the contract price in full.

VIII.

That defendants failed and refused to deliver to plaintiff between October 1st and 31st, 1919, as directed by plaintiff, the remainder of the 1919 crop of hops raised and grown by them on said lands, amounting to 10,478 pounds; that defendants have refused to deliver said hops, although demand therefor has been made by plaintiff, and have converted the same to their own use.

IX.

That the market value of said hops at the time and place specified in said contract for the delivery thereof was 85 cents per pound; that by reason of defendants' failure and refusal as aforesaid to make delivery of said 10,478 pounds as provided in said contract, plaintiff has been and is damaged in the sum of $7229.92, being the difference between the contract price and the market price of said hops at said time.

Wherefore, Plaintiff prays for judgment against defendants and each of them for the sum of $7229.92 with interest from October 31, 1919, at the rate of six per cent per annum, besides the costs and disbursements of this action.

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff.

State of Oregon,
Multnomah County,—ss.

I, Thomas G. Greene, being first duly sworn, say I am one of plaintiff's attorneys, and make this verification on its behalf for the reason that none of its officers are within this state; that the foregoing complaint is true as I verily believe.

THOMAS G. GREENE.

Subscribed and sworn to before me this 17th day of March, 1920.

J. L. POTTS,
Notary Public for Oregon.

My commission expires.....

(SEAL)

EXHIBIT "A"

(Annexed to Complaint)

THIS AGREEMENT, Made this 26th day of January, 1917, by and between Adam Orey and W. J. Bishop of Salem, County of Marion and State of Oregon, parties of the first part, and hereinafter also called the seller, and A. Magnus & Sons of Chicago, County of..... and State of Illinois, parties of the second part, and hereinafter also called Buyers.

WITNESSETH: That said Seller, for and in consideration of the sum of One Dollar in hand paid by the Buyers, the receipt whereof is hereby acknowledged do hereby agree to sell and deliver to the Buyers, their executors, administrators, or assigns, Sixty Thousand (60,000) pounds of hops of the crop to be raised and grown by the Seller, in the following year Nineteen hundred and nineteen on the following described real estate, to-wit: Forty-five acres of land now set in hops situated 9 miles North of Salem, Marion County, Oregon, in South Prairie and twenty-four acres of land now set in hops, both known as the Hop Lee ranch in South Prairie and to deliver the said hops in said year at boat landing, depot or on board cars free of charge, at such time between the 1st and 31st day of October of said year as the Buyers may direct.

Each bale of said hops to contain from 180 to 210 pounds of hops (five pounds tare per bale to be allowed), and are to be put up in new bale cloth.

The said hops shall be of prime quality of even color, well and cleanly picked and sprayed and not broken. And the Seller further agrees that this contract shall have preference, both as to quantity and quality, over all other contracts made as to said growth of hops by the Seller with any other purchaser.

The Buyers agree to advance to the Seller Eighteen hundred on or about April 1st Dollars, and for picking purposes on or about the first day of September of said year to enable the Seller to harvest said crop of hops, and prepare the same for market in the manner in which the Seller agrees to harvest and prepare the same, the sum of five cents per pound at Salem, Oregon, provided that at that time no lien superior to the one hereby created exists on said crop of hops; and, provided, further, that before at or during the time of picking of said hops the Buyer shall have the right to examine the condition of the growing hops to determine whether the same are at such time in the condition in which they should be to produce the quality called for by the terms of this agreement; and should there be a dispute or difference of opinion between the Buyers and Seller as to whether the hops will produce the quality called for, such differences shall be decided by two competent persons, one selected by the Buyers and one selected by the Seller, with power to choose an umpire if they do not agree, and their decision shall be conclusive and final; and if it shall be determined that the growing crop is

not in such condition then the Buyers shall be released from any obligation to furnish money as called for by this contract; and such advances as may have been made prior to such determination, with interest at the rate of ....per cent per annum thereon, is hereby made a lien upon such hop crop prior and preferable to all other liens. And upon the delivery and acceptance of said hops, the Buyers will pay in current funds of the United States or their equivalent three and half cents per pound, the balance due on said hops at 11½ cents per pound that being the agreed price for said hops, and all money advanced for the purposes aforesaid, with ....per cent interest to be deducted from the purchase price of said hops.

Should said hops be from any cause of a lesser quality than called for in this contract, the Buyers shall, nevertheless, have the privilege of taking same or so many of them as will cover the amount advanced on said crop, with interest at the rate of ...per cent per annum, at a reduction in price equal to the difference in value between such hops and those by this contract called for.

For the purpose of obtaining the money provided for in this contract, the Seller represents to the Buyers, that they lease the above described property, which is free from all encumbrances, except....and that....made no other contract for the sale of any part of said crop of hops, except....

It is further agreed that the Seller shall keep said hops insured in some responsible insurance

company for their market value, from the time same are picked until delivered, such insurance to be for the benefit of the Buyers and to be made payable to the Buyers as their interests may appear. And should the Seller fail to keep said hops so insured, then the Buyers may insure them, and the money paid for such insurance shall be deducted from the purchase price of said hops.

And it is hereby agreed by and between the parties, that in case of loss of the said hops by fire, wind or otherwise, before delivery, the Seller, their executors, administrators, or assigns, shall and will immediately repay to the Buyers or their heirs or assigns all moneys heretofore paid to the Seller under this contract, with interest at the rate of 7 per cent per annum, from the time such payments were made until the money is repaid.

It is agreed that if the Seller should sell said hops, or any part thereof, in violation of the terms of this agreement to any other person or persons or refuse to deliver the same to the Buyers, as herein agreed, or otherwise fail to perform the terms and conditions of this contract, to be kept and performed by him, the Buyers not being in default, in the terms and conditions to be by them kept and performed the Buyers shall be entitled to receive, in addition to all advances made and interest thereon, as herein specified and agreed, as liquidated and ascertained damages for such breach on the part of the Seller the difference in value between the contract price of said hops, as herein specified

and the market value thereof of the kind and quality in this contract mentioned at Salem, Marion County, Oregon, on the 31st day of October, 1919; and should the Buyers fail on their part to accept and pay for the hops herein agreed to be sold, the Seller not being in default in the terms and conditions to be by him kept and performed, the Seller shall be entitled to receive as liquidated and ascertained damages for such breach on the part of the Buyers, the difference between the contract price of said hops, as herein specified, and the market value of the kind and quality in this contract mentioned at ....Salem, Marion County, Oregon, on said 31st day of October, 1919.

And inasmuch as the Buyers have agreed to make certain advances under the terms of this contract, relying upon the promises of the Seller herein contained, the Seller for the faithful performance of this contract and as security for the advances which the Buyers may make and for such damages as they, the Buyers, may sustain by reason of the default of the Seller, does hereby bargain, sell, pledge and mortgage to the Buyers the entire crop of hops to be raised upon the premises above described in the year 1919, and does authorize and empower the Buyers, upon such default or breach of the Seller to foreclose this agreement as a mortgage, and it shall be lawful for such person, his agents or assigns to take immediate possession of said property and to sell the same at public auction, after giving notice of the same as is given by the

sheriff on the sale of personal property on execution, and the proceeds of said sale shall be applied to the payment of the reasonable expenses of such sale, including the taking possession of and keeping of such property, and to the payment of all advances and interests thereon, and the damages sustained by the Buyers, together with reasonable attorney fees in any proceeding had in connection with the foreclosure of this lien, and the overplus, if any, shall be paid to the Seller, his assigns or legal representatives.

It is further agreed that the Seller shall not be responsible for any default in the provisions of this contract, excepting to repay advances and interest thereon, by reason of shortage of the crop of hops raised upon said premises, if such shortage be occasioned by unfavorable season and could not be for that reason prevented by him.

IN WITNESS WHEREOF, the parties aforesaid have hereunto set their hands and seals the day and year first above written.

Executed in the presence of:
EARL F. DeLASHMUTT
C. BURLESON

ADAM OREY (Seal)
W. J. BISHOP (Seal)
A. MAGNUS SONS CO.
G. G. SCHUMACHER
Secy. and Treas.

State of Oregon,
County of Yamhill,—ss.

On this 26th day of January, 1917, before me, the undersigned, a Notary Public, personally came, Adam Orey and and W. J. Bishop, to me personally known to be the identical persons described in and who executed the foregoing instrument and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year last above written.

C. BURLESON,
Notary Public for Oregon.

My commission expires October 13, 1919.
(Notarial Seal)

Endorsed: Recorded in Marion County Records Book of Hop Contracts, Vol. 23, page 204, Feb. 16, 1917.

MILDRED R. BROOKS,
County Recorder.

And on April 13, 1920, there was filed to said complaint the following

ANSWER

(The parts of said answer subsequently stricken out on Motion, are, for convenience of reference, italicized and printed in parentheses.)

Come now the defendants and for answer to plaintiff's complaint:

I.

Admit the allegations contained in Paragraphs I, II and III of said complaint.

II.

Admit that the defendants executed the contract annexed to the complaint and marked "Exhibit A", but deny that defendants sold to plaintiff thereby or otherwise 60,000 pounds of hops of the crop to be raised and grown by defendants in the year 1919 on the lands described in said contract, or any part of 60,000 pounds of said crop of hops in excess of the actual amount of hops that the defendants were to receive out of the crop grown on said lands *(after the owner of said premises had retained one-fourth of the total amount of hops grown thereon as crop rental for the use of said premises, all as is more particularly hereinafter set forth.)*

Admit the allegations contained in Paragraph IV of said complaint, except as the same have hereinbefore been specifically denied.

III.

Admit the allegations contained in Paragraphs V and VI of said complaint.

IV.

Denies that the defendant raised, grew or harvested 40,000 pounds of hops in the year 1919 and in this respect allege:

That approximately 40,000 pounds of hops were grown on said lands in said year by the defendants *(and one, Hop Lee, the owner of said lands and the lessor of said lands to the defendants, the lessees thereof, under a crop rental lease.)*

Admit that the defendants delivered to plaintiff 29,592 pounds of hops and no more and that plaintiff paid defendants the contract price therefor.

V.

Deny each and every allegation contained in Paragraph VIII of said complaint, except that defendants admit they have refused to deliver to plaintiff any hops in excess of 29,592 pounds and admit that demand for such delivery has been made upon them by plaintiff.

VI.

Deny each and every allegation contained in Paragraph IX of said complaint.

And for a first, further and separate answer and defense to plaintiff's complaint, defendants allege:

I.

(That during the year 1919 they leased from one Hop Lee, the owner thereof, the lands described in the contract attached to plaintiff's complaint as "Exhibit A," under a lease by the terms of which the defendants were entitled to the use and possession of said lands during the year 1919 for the purpose of raising and growing thereon a crop of hops with a rental reserved to the owner

of said lands of one-fourth of all of the hops grown during said year 1919 thereon.)

II.

That the contract between plaintiff and defendants, dated January 27, 1917, and attached to plaintiff's complaint as an exhibit thereto, was executed by the defendants and the plaintiff on or about the date thereof and was intended to, and did in fact, provide for the sale and purchase of all of the hops of the crop to be raised on the premises described therein during the year 1919 and grown by the defendants *(and was not intended to, and in fact did not, include one-fourth part of the crop of hops, grown on said premises during the year 1919, belonging to and grown by Hop Lee, the owner of said premises, as a tenant in common with the defendants of the crop of hops grown by the said Hop Lee and the defendants jointly on said premises during said year.)*

III.

That prior to the date on which said contract was entered into between the plaintiff and the defendants, the plaintiff knew that the premises described in said contract were leased by the defendants from the said Hop Lee under a lease whereby the said Hop Lee was entitled to retain one-fourth part of said crop and was a joint tenant with the defendants in the production and ownership thereof. *(That it is inequitable to the rights of the defendants that the plaintiff should now be permitted to contend for a construction of said con-*

tract by virtue of which the defendants are obligated to sell and deliver to the plaintiff all of the hops produced on said premises, including the hops of the said Hop Lee, to which the defendants had no estate, right, title or interest.)

IV.

(That in truth and in fact the agreement between the plaintiff and the defendants with respect to the sale of the crop of hops to be grown on said premises was intended to be and was an agreement on the part of the defendants to sell to the plaintiff as many pounds of hops not in excess of 60,000 pounds as might be grown and harvested by the defendants alone, on and from said premises during the year 1919 and including only that part of the hops grown on said premises of which the defendants were the owners and to the delivery of which the defendants were to become entitled after there had been retained by Hop Lee, the owner of said prmises, one-fourth part of the total crop produced thereon by him and by the defendants jointly to which one-fourth part said owner was entitled under the terms of the lease hereinbefore set forth.)

V.

That there were raised and grown by the defendants on said premises during the year 1919, 29,592 pounds of hops and no more and that said hops were the only hops which the defendants were entitled to receive or did receive from the hops grown on said premises or in or to

which the defendants or either of them had any right, title or interest.

VI.

(That in justice and in equity defendants are entitled to a construction of said contract under and by virtue of which no obligation will be imposed upon them to sell or to deliver to the plaintiff any hops, produced on said premises during the year 1919, in excess of the hops raised and grown by the defendants and of which they were the owners and to the possession of which they were entitled, to-wit, 29,592 pounds of hops. And that if said contract as now written, by reason of the inadvertence and mistake of the parties in reducing the same to writing and thereby failing to set forth in writing their intentions and actual agreements, is not susceptible of the construction herein contended for, defendants are entitled to a reformation of said contract so that the same will be reformed under decree of this Court so as to impose no obligation on the part of the defendants beyond the obligation which they assumed and which it was the intention of the plaintiff and defendants to define and create by said contract.)

And for a second, further and separate answer and defense to plaintiff's complaint, defendants allege:

I.

That during all the times herein mentioned, and for many years prior hereto, a usage and custom has existed in the hop business in the State of Oregon, with

which both the plaintiff and the defendants were and are familiar, and subject to which usage and custom, the contract, which forms the subject matter of this litigation, was entered into, that hop ranches should be leased upon a crop rental rather than upon a cash rental basis.

II.

The contract, which forms the subject matter of this litigation, contains a specific recital that the defendants leased the premises described in said contract.

III.

That the hop industry in the State of Oregon, by reason of the violent fluctuations in the price of hops, which can not be forseen with reasonable prevision, is a highly speculative one on account of which fact a usage and custom developed and for a long time has existed by which the producer of hops will not contract for future delivery a definite number of pounds thereof, but with respect to any contract for future delivery will limit his obligation to sell and deliver so many hops only as may be produced from definite tracts of land and to the ownership of which the seller, under all conditions and irrespective of fluctuations in price, will be entitled at the time his obligation to deliver to the buyer becomes a present one.

IV.

That by reason of the customs and usages hereinbefore set forth, and the express knowledge of the parties

to said contract of the fact that the defendants were lessees of the premises described in said contract, it was the intention of the parties to said contract to provide for the sale and delivery to the plaintiff of only so many pounds of hops not in excess of 60,000 pounds as might be produced on said premises during 1919 of which the defendants were the owners.

V.

That there were produced on said premises during the year 1919, 29,592 pounds of hops and no more of which the defendants were the owners or in or to which they or either of them had any estate, right, title or interest and that all of said hops were delivered by defendants to the plaintiff in full and complete performance by them of the obligation contained in the contract between them and the plaintiff.

VI.

That in justice and in equity and by reason of the existence of the customs and usages hereinbefore set forth and the intentions of the parties to said contract arising therefrom, said contract should be so construed by this Court as to impose upon the defendants no obligation to deliver to the plaintiff any hops in excess of said 29,592 pounds thereof produced and owned by them as has been hereinbefore alleged.

WHEREFORE defendants pray that the plaintiff may take nothing on account of its action, that it be decreed that they have fully performed all obligations imposed upon them by the contract between them and

the plaintiffs as written, or in the event that a reformation of said contract be necessary to protect the equitable rights of the defendants, that said contract be reformed and re-written by this Court so as to impose no obligation upon the defendants to deliver to the plaintiff any hops grown on said premises during the year 1919 in excess of that part of the crop of which the defendants were the owners and that they have a decree for their costs and disbursements herein.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

To the foregoing answer there was interposed the following

MOTION TO STRIKE AND DEMURRER

Plaintiff moves for an order separately to strike from defendants' answer the following portions thereof for the reason that the same and each thereof are irrelevant, and immaterial, viz:

1. The following language in the last four lines of paragraph II, page 1: "After the owner of said premises had retained one-fourth of the total amount of hops grown thereon as crop rental for the use of said premises, all as is more particularly hereinafter set forth."

2. The following language in lines 7 to 9, page 2: "and one Hop Lee, the owner of said lands and the lessor of said lands to the defendants, the lessees thereof, under a crop rental lease."

3. All of paragraph I of the first further and separate answer on page 2.

4. All of paragraph II, page 3, of said first separate answer beginning in line 8 and reading as follows: "and was not intended to, and in fact did not, include one-fourth part of the crop of hops, grown on said premises during the year 1919, belonging to and grown by Hop Lee, the owner of said premises, as a tenant in common with the defendants of the crop of hops grown by the said Hop Lee and the defendants jointly on said premises during said year."

5. All that portion of paragraph III, page 3, beginning with the word "That" in line 22.

6. All of paragraphs IV and VI of said first separate answer.

Nos. 5 and 6 for the additional reason that the matter therein moved against states mere conclusions and presents no issuable facts.

And not waiving the foregoing motion, but in addition thereto, plaintiff demurs:

1. To the first further and separate defense set up in said answer. (*Transcript*, pp. 14-17, *supra.*)

2. To the second further and separate defense set up in said answer. (*Transcript*, pp. 17-19, *supra.*)

For the reasons that neither of them state facts sufficient to constitute a defense to said complaint.

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff.

Thereafter argument of counsel for the parties upon said motion and demurrer was submitted, and on August 15, 1921, District Judge R. S. Bean decided the same in the following

MEMORANDUM OPINION

R. S. BEAN, District Judge: (ORAL)

This is an action to recover damages for an alleged failure to deliver hops in pursuance of a written contract. It appears from the complaint that defendants agreed to sell and deliver to plaintiff 60,000 pounds of hops of the crop to be raised and grown by them during the year 1919 on certain described property. The contract was to have preference over all others concerning the hops, made by these sellers. Plaintiff was to advance $1800.00 in the spring, and for picking purposes five cents per pound the first of September. These advances were made. Defendants raised about 40,000 pounds of hops but delivered to plaintiff only some 29,000 pounds. This action is brought to recover damages for failure to deliver the balance.

Defendants in their answer alleged, among other things, that they were lessees under a contract by the terms of which they were required to deliver a certain part of the hops to the landlord, that they did make such delivery, and delivered the remainder to plaintiff, which they claim was a compliance with their contract.

The contract itself, however, is very definite and certain. It provides for the delivery of a certain number of pounds of hops, of the crops grown by defendants during a certain year on certain premises. There were no exceptions in the contract. Indeed, it indicates all the way through that the parties intended the delivery of 60,000 pounds of hops if that quantity was grown by defendants during the year. This is indicated very

clearly by the fact that in September, 1919, plaintiff made an advance under the contract of $3000.00 which was five cents a pound on 60,000 pounds.

It is true where the terms of a contract are ambiguous parol evidence is admissible to explain its terms. Thus where a contract stipulated that a lessee should pay to the lessor one-half the proceeds of the crops produced the courts held that parol evidence is admissible to determine whether the word proceeds was net proceeds or gross proceeds. There are no such ambiguities in the contract in suit.

It is also alleged in the answer that at the time the contract was made there was a custom known to the seller and purchaser of hops that where the seller was a lessee a part of the crop necessarily went to the landlord, and that this should be construed with reference to that custom. A custom may be important in the interpretation of a contract, but it cannot be resorted to for the purpose of varying or adding to the plain language of the instrument. I take it, therefore, the motion to strike out the allegations of the answer with reference to the obligation of the defendants to their landlord and the delivery of hops to him, and the custom prevailing at the time the contract was made should be allowed.

It is also alleged or stated in the answer that the contract as written and signed, by mistake omitted the condition that defendants should not be required to deliver to plaintiff the landlord's portion of the hops. It is true that in this court the defendant in a law action may set up an equitable defense but the answer does not

go far enough to do so. It does not allege what the original contract was or that by mutual mistake the provisions permitting the delivery of hops to the landlord was omitted, and without allegation of that kind the answer would not be sufficient to justify a decree reforming the contract.

The demurrer to the answer is sustained, with leave to amend if the defendants so elect.

And on August 15, 1921, there was entered the following

ORDER

This cause was heard by the court upon the motion to strike out parts of the answer and the demurrer to the answer herein, plaintiff appearing by Mr. Thomas G. Greene of counsel, and defendants by Mr. G. L. Buland of counsel, upon consideration whereof

IT IS ORDERED that said motion to strike out be and the same is hereby allowed, and that said demurrer to the answer herein be and the same is hereby sustained, with leave to the defendants to amend said answer if they so elect.

And thereafter on October 17, 1921, there was filed the following

AMENDED ANSWER

Come now the defendants in the above entitled court and cause, and as an amended answer, leave of court having been first had and obtained, to plaintiff's complaint, admit, deny and allege as follows:

I.

Admit the allegations contained in Paragraphs I, II and III of said complaint.

II.

Deny each and every allegation contained in Paragraph IV of said complaint, except that the defendants admit that plaintiff and defendants executed the writing set forth as Exhibit "A" to plaintiff's complaint on or about the 26th day of January, 1917, and defendants admit that a copy of said writing is annexed as Exhibit "A" to said complaint, and defendants further admit that by the terms of said writing, defendants and plaintiff were to do the acts set forth in said paragraph, except that defendants deny that they sold to plaintiff thereby, or otherwise, 60,000 pounds of hops of the crop to be raised and grown by defendants in the year 1919 on the lands described in said contract, or any part of 60,000 pounds of said crop of hops in excess of the actual amount of hops that the defendants were to receive as their share of the crop grown on said lands.

III.

Admit the allegations contained in Paragraphs V and VI thereof.

IV.

Deny each and every allegation contained in Paragraph 7 except that defendants admit that defendants delivered 29,592 pounds of hops to plaintiff and no more,

and that plaintiff paid the defendants the contract price therefor.

V.

Deny each and every allegation contained in Paragraph VIII of said complaint, except that defendants admit that they have refused to deliver to plaintiff any hops in excess of 29,592 pounds, and admit that demand for such delivery has been made upon them by plaintiff.

VI.

Deny each and every allegation contained in Paragraph 9 of said complaint.

DEFENDANTS FOR A FURTHER AND AFFIRMATIVE Answer and Defense allege:

I.

That during the year 1919 and at the time at which the writing set forth in plaintiff's complaint was executed, the defendants had under lease from one Hop Lee, the owner thereof, the lands described in said writing, and by the terms of said lease defendants were entitled to the use and possession of said lands for the purpose of raising hops thereon, and from the crop of hops grown thereon they were to receive three-fourths thereof and said Hop Lee, as a crop rental was to receive one-fourth of said hops.

II.

That prior to the execution of the writing set forth

in plaintiff's complaint, negotiations were carried on between defendants, acting through their agent, A. C. Bishop, and plaintiff, at Chicago, Ill., for the contracting of said defendants' share in the crop to be raised in 1919 on the premises described in said writing.

III.

That as a culmination of said negotiations, an agreement was entered into by and between plaintiff and defendants for the purchase by said plaintiff from defendants of 60,000 pounds of so much of the hops to be grown in 1919 on the premises described in Exhibit "A" to plaintiff's complaint, to which the defendants would become entitled by the terms of the lease held by them of said premises as set forth in Paragraph I hereof. By said agreement, 60,000 pounds of hops were to be delivered by defendants to plaintiff if the defendants' share in the hops grown on said premises should be equal to, or in excess of, that amount, but in case defendants' share should amount to less than 60,000 pounds because of a shortage of crop, then defendants should deliver the full amount of their share of said crop. By said agreement defendants further agreed to mortgage to plaintiff their entire share of said crop to secure advances made by plaintiff to them. The further terms of said agreement, not relating to the description of the hops sold by defendants to plaintiff, were as expressed in the writing attached as Exhibit "A" to plaintiff's complaint.

IV.

That thereafter said agreement was reduced to writ-

ing, which writing was executed by the defendants in the State of Oregon, where said writing was prepared.

V.

That said writing prepared as above stated is set forth as Exhibit "A" to plaintiff's complaint; that by reason of the mutual mistake and inadvertence of the plaintiff and defendants in reducing said agreement to writing, said writing did not, and does not, express the true agreement and understanding of the parties thereto in that the description of the hops sold to plaintiff by defendants as contained in said writing is as follows: "60,000 pounds of hops of the crop to be raised and grown by the seller in the following year, 1919, on the following described real estate," and the description contained in said writing of the crop to be mortgaged by defendants to plaintiff is as follows: "The entire crop of hops to be raised upon the premises above described in the year 1919," which descriptions of the hops covered by said contract were, by reason of the mutual mistake and inadvertence of the parties, erroneous, and to make said descriptions conform to the true agreement and understanding of the parties as said agreement is set forth in Paragraph III hereof, said provisions should be reformed and rewritten by this court, so that the description of the hops to be sold by defendants to plaintiff should read as follows: "60,000 pounds of hops of the seller's share of the crop to be raised and grown in the following year 1919, on the following described real property," and the description of the hops to be mortgaged by defendants to plaintiff should read as follows:

"The seller's share of the crop of hops to be raised upon the premises above described in the year 1919."

VI.

That the writing set forth in Exhibit "A" to plaintiff's complaint was prepared on a printed form procured from a legal blank publisher of Salem, Oregon, which said printed form contained in print the provisions in regard to the hops covered by said contract, and said parties filled out the blanks in said contract without changing the printed matter providing for the hops covered by said contract, and it was by reason of the use of this printed form as aforesaid that the said mutual mistake of plaintiff and defendants in the description of said hops occurred: The said mistake in the description of the hops covered by said agreement did not arise on account of the negligence of defendants, for the reason that the defendants were induced to use said printed form without changing the description of the hops covered thereby, because said printed form was in common use among hop raisers and hop dealers in the State of Oregon, and was commonly and customarily used to cover the sale of any interest in a crop of hops without change of the printed words describing the hops sold, and defendants were further induced in this regard by the fact that it was the custom and usage in the hop business in the State of Oregon, with which usage and custom both the plaintiff and defendants were familiar, not to sell hops on a speculative basis, and not to contract for the sale of hops for future delivery except for so many hops as would be produced, and to which the seller

would become entitled from certain described land, and defendants were further induced to use said printed form without change in said printed words for the reason that similar provisions in regard to the hops sold had been contained in other contracts between plaintiff and defendants, and said plaintiff had given a practical construction thereto by not requesting or requiring the defendants to deliver that portion of the crop of hops raised on the premises mentioned in the contract, to which the landlord became entitled by reason of a crop rental.

VII.

That defendants did not discover said mistake in said writing, and were not aware that under the terms of said writing, contention could be made that they were obligated to deliver to plaintiff the share of the hops grown on said premises belonging to said Hop Lee on account of said lease, until the plaintiff demanded said hops shortly before the bringing of this action.

VIII.

That due to shortage of crop the defendants' share of the hops grown on the premises described in Exhibit "A" to plaintiff's complaint during the year 1919 was 29,592 pounds and no more, which hops, and the entire amount thereof, defendants delivered to plaintiff in accordance with the true agreement and understanding of the parties.

WHEREFORE defendants pray that plaintiff take nothing by its complaint herein, and that the writing set forth as Exhibit "A" to plaintiff's complaint be

reformed and rewritten in accordance with the true agreement and understanding of the parties as aforesaid, and that defendants do have and recover their costs and disbursements of and from the plaintiff.

DEY, HAMPTON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

To the foregoing Amended Answer, on October 31, 1921, there was filed the following

REPLY

Now comes the plaintiff and for reply to the amended answer of defendants, admits, denies and alleges as follows:

I.

Denies that it has any knowledge or information sufficient to form a belief as to any of the matters and things alleged in paragraph I of the further and affirmative answer and defense set up in said amended answer and therefore denies the same and the whole thereof.

II.

Admits that prior to the execution of the contract set forth in the complaint negotiations were carried on between plaintiff and defendants, but denies that there was any mention or reference to defendants' alleged share in the crop to be raised in 1919 on the premises described in said writing, but alleges that said negotia-

tions were wholly with respect to the entire crop of hops to be given in 1919 on said premises.

III.

Denies paragraphs III, IV, V, VI, VII and VIII of said affirmative answer.

WHEREFORE plaintiff demands judgment as prayed for in its complaint.

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff.

Thereafter on January 9, 1922, said cause came on regularly for trial on the equity side of said court before the Honorable Chas. E. Wolverton, a judge of said court, upon the affirmative answer and defense set up in said amended answer.

And on January 10, 1922, upon the conclusion of said trial, and after delivering the memorandum opinion set out at pages 35 to 38 of this transcript, said court made, signed and filed the following

ORDER

Now at this day come the parties hereto by their counsel as of yesterday, whereupon the hearing of this cause upon the further and separate defense in the answer of said defendants is resumed; and the court, having heard the evidence adduced, and the arguments of counsel, and being now fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the prayer of the further separate answer and defense in the answer of said defendants for a reformation of the

contract set out in the complaint herein be and the same is hereby denied, and that said further separate answer and defense be and the same is hereby dismissed. Thereupon,

IT IS ORDERED that this cause be and the same is hereby continued for further trial as an action at law.

And thereafter on January 11, 1922, said cause went to trial as an action at law before the same judge and jury, and at the conclusion thereof on the 12th day of January, 1922, the following

JUDGMENT ORDER

was made and entered therein, to-wit:

Now at this day came the parties hereto by their counsel as of yesterday, whereupon the jury empaneled herein being present and answering to their names, the trial of this cause was resumed, whereupon said jury having heard the evidence adduced, upon motion of plaintiff for a directed verdict in favor of said plaintiff,

IT IS ORDERED that said motion be and the same is hereby denied, and therefrom upon motion of defendants for a directed verdict in their favor,

IT IS ORDERED that said motion of defendants be and the same is hereby allowed. Whereupon without retiring from the jury box, said jury, by direction of the court, returns the following verdict, viz.:

"We, the jury empanelled in the above entitled court and cause, under the direction of the court, return our verdict for the defendants and against the plaintiff.

R. L. Weatherford, Foreman."

which verdict is received by the court and ordered to be filed. Whereupon on motion of plaintiff

IT IS ORDERED that it be and is hereby allowed thirty days from this date to move for a new trial herein. And thereupon on motion of said defendants for judgment upon the verdict

It is adjudged that said plaintiff take nothing by this action and that said defendants do have and recover of and from said plaintiff their costs and disbursements taxed in the sum of $56.60 and that execution issue therefor.

And thereafter on April 25, 1922, and within the time fixed by order of said court therefor, there was served, tendered and lodged with the clerk of said court the following

BILL OF EXCEPTIONS

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

A. MAGNUS SONS COMPANY,
a Corporation,
Plaintiff,

vs.

ADAM OREY AND W. J. BISHOP,
Defendants.

BE IT REMEMBERED that the above entitled cause came on regularly for trial, at a stated term of said court held at Portland, in and for the State and District of Oregon, before Honorable Charles E. Wol-

verton, District Judge, on the 9th day of January, 1922, as a suit in Equity and on the Equity side of said court on the issues presented by the further and affirmative answer and defense in defendants' amended answer, and reply thereto, the plaintiff appearing by G. G. Schumacher, its Secretary and Treasurer and by its attorneys, Bauer, Greene & McCurtain, Thomas G. Greene of counsel, defendants appearing in person and by their attorneys, Dey, Hampson & Nelson, Alfred A. Hampson and G. L. Buland of counsel.

Thereupon the parties called witnesses to maintain and prove the issues on their respective parts on the equitable defense set up in defendants' said amended answer, and the said Court, after hearing the testimony, and the argument of counsel, delivered the following decision:

WOLVERTON, District Judge (Orally):

The claim for reformation of the contract in this case is based upon a mutual mistake of the parties. I think there is no doubt that the sellers did make a mistake, or at least they were not careful enough in drawing their contract; but the plaintiff made no mistake. There has been no showing that there was a mistake on the part of the purchaser in the formation of this contract. The contract was written here by the sellers, and it was sent back to Chicago, and received there by the buyer, and the buyer signed it.

There is no testimony here at all showing that there was any mistake made on the part of the buyer, and, in cases of this kind, the testimony must show by clear evidence that there was a mutual mistake between the

parties. In such a case as that, the court will reform the instrument; otherwise, it will not; and I do not think, in this case, that the testimony supports a cause for reformation on the ground of mutual mistake. The equity case, therefore, will have to be dismissed.

As to the practice which should obtain, I think the case that has been cited, namely, Union Pacific R. Co. v. Syas, 246 Fed. 561, is one that this court ought to follow. That was a case, as counsel will remember, where the plaintiff sued for damages that had been received by him, and the defendant set up that there had been a settlement as to the damages. The plaintiff replied that the settlement was obtained through fraud. Then the question came up as to whether or not that presented a case which should be tried in equity, because of the fact, as alleged, that the settlement had been obtained through fraud. The court there held that the matter set up in the reply was matter for equitable relief, and should have been first tried and disposed of on the equitable side of the court. That was because of the statute of March 3, 1915, which reads:

> "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication."

It was under that clause that the court held that the equitable matter set up in the reply should be first tried on the equity side of the court, and disposed of by the court. Then if the court found that the facts were as alleged by the plaintiff in the reply, that would have the effect of setting aside the settlement, and that would be as far as the court could go on the equity side. Thereupon the case would be referred to the law side of the court, and there tried out.

This is such a case as that, only that the answer here sets up an equitable matter, and in the reply that equitable matter is denied. That presents to this court an equitable defense, and that should be tried out in equity. Then the question as to whether the case should be further tried in law or in equity should be resolved in favor of the trial proceeding on the law side of the court.

Now, there is another case which is decided by the same Circuit Court of Appeals. It is the case of Fay v. Hill, 249 Fed. 415. The court says there:

> "But, aside from this, if there had been a transfer to the law side of the court, and the bill treated as an answer to the action at law, if it stated an equitable defense, it would have had to be disposed of by the court, sitting as a chancellor, before the trial of the action at law to a jury; and if upon such a hearing the equitable defense had been sustained there would be nothing left to try to a jury."

The Syas case is then cited, and it is followed.

The practice in our state court is practically to the same effect, and I simply cite counsel to section 390 of the Oregon Laws. I suppose, from the language of the

court in the Syas case, that the laws of Colorado were taken into consideration; and I assume that those laws are about the same as the laws in the State of Oregon. At least, the court has come to the conclusion that the case must proceed in equity until the equitable matter is determined in that forum, and then it will depend on how that matter is determined whether the case goes back to the law side of the court. If the decision of the court on the equity side is decisive of the controversy, that ends the case. If it is not decisive of the controversy, then the case goes back to the law side of the court, to be there tried out, and determined by a jury, unless the parties waive a jury. I decide that feature of it now, and the case will be remitted to the law side of the court; the court having found against the equities as set up by the answer.

And thereafter, on the 10th day of January, 1922, in pursuance of said decision of the court, there was duly signed and entered in said cause, a decree as follows (omitting formal parts):

Now at this day come the parties hereto by their counsel as of yesterday, whereupon the hearing of this cause upon the further and separate defense in the answer of said defendants is resumed; that the court, having heard the evidence adduced and the argument of counsel, and being now fully advised in the premises

IT IS ORDERED AND ADJUDGED that the prayer in the further and separate answer and defense in the answer of the said defendants for a reformation of the contract set out in the complaint herein be and the same is hereby denied, and that said further and

separate answer and defense be and the same is hereby dismissed.

IT IS ORDERED that this cause be and the same is hereby continued for further trial as an action at law.

CHAS. E. WOLVERTON,
Judge.

THEREUPON in conformity to said decree a jury was empanelled and on the 11th day of January, 1922, said cause went to trial before the same judge and a jury as an action at law on the remaining issues therein as presented by the complaint and denials of the amended answer, the same parties and their respective counsel being present, and the following proceedings were had, to-wit:

To maintain and prove the issues on its part plaintiff called as a witness

G. G. SCHUMACHER, who, being first duly sworn, testified as follows:

Am Secretary and Treasurer of A. Magnus Sons Company, Chicago, plaintiff in this case, who buys and sells hops in practically all of the American markets. The market price of hops at Salem, Oregon, on October 31, 1919, was 85 cents a pound, or thereabouts. Plaintiff made purchase near that time.

FRANK S. JOHNSON, a witness called by the plaintiff, being first duly sworn, testified as follows:

I am a member of Frank S. Johnson Company, hop dealers, and have been in that business in Oregon about 22 years. The market price of hops at Salem, Oregon, on October 22, 1919, was around 85 cents a pound. That

price was paid then. I don't believe it went more than 86½ cents for a few lots. It was around 85 to 86 cents. I would say from October 22nd on down to October 31, 1919, the price ran from 85 cents to 86 cents per pound. That was the maximum.

Thereupon it was stipulated and agreed by and between plaintiff and defendant in open court that the total amount of hops grown and picked by defendants on the lands described in the contract sued upon during the year 1919 was 38,429 pounds net weight, of which 28,882 pounds net weight were delivered by defendants to plaintiff on said contract, and 9607 pounds net weight remain undelivered.

Plaintiff then rested its case.

To maintain and prove the issues on their part defendants thereupon called as a witness

W. J. BISHOP, who, being first duly sworn, testified as follows:

I am one of the defendants in this case and live in Portland. Was formerly in business in Marion County, Oregon. Have been in the hop business a long time, as a grower of hops, and have leased lands for the purpose of growing hops. Had lands under lease in 1916 for that purpose. Have known of plaintiff company for twenty years and have met all of the Magnusses connected with it, both in Oregon and back East. Representatives of that company were quite frequently in Oregon, and they came in contact with growers and producers of hops and dealers in hops, on the occasions of their visits.

Question (by Mr. HAMPSON): And has that

condition endured during the period of your knowledge of the firm?

MR. GREENE (for the plaintiff): If your Honor please, I supposed this was introductory and preliminary. If it is not, I object to it on the ground it is immaterial, pertinent to no issue in this case. This is a dispute about one particular contract, not a course of dealings, and therefore this testimony is not relevant and I object to it on that ground.

THE COURT: I will overrule the objection for the present. We will see where it leads to.

(EXCEPTION NO. 1)

Q. (by MR. HAMPSON): What can you say, Mr. Bishop, as to the knowledge that existed on the part of the Magnuses you knew with respect to the customs and usages of the hop business in Oregon, and the manner in which that business was carried on?

A. They had a thorough knowledge.

MR. GREENE: I want to interpose an objection. This witness is not competent to testify to the knowledge some other man has of the hop business or anything else. That is a conclusion.

THE COURT: I think you better draw out the facts as they exist as to the Magnuses' knowledge, and not what this man might say as to their knowledge.

Continuing, the witness then testified that he had occasion to converse with Albert Magnus and August Magnus at different times prior to January, 1917, with Albert Magnus in Oregon, and with August Magnus in Chicago, relating to the hop industry.

Q. (by MR. HAMPSON): What aspects of the hop business were covered in your conversations with them?

MR. GREENE: Objected to. Apparently there has enough been drawn out now to show where this is leading, and I want to interpose an objection.

THE COURT: You object to showing the custom?

MR. GREENE: I object to proof by this witness of knowledge on the part of Albert Magnus or August Magnus, or anybody else of custom. I also object to proof of custom, on the ground that you cannot prove custom or usage to impress a new term into, or take a term out of, or to vary a term in, an express written contract.

THE COURT: I have this view on that proposition: In the first place, I will say that this contract has to be construed by the court.

MR. GREENE: Yes, if it needs construction.

THE COURT: Yes, if it needs construction. And the custom, if one prevailed at that time, might be important to put the court in place of the parties, and to get in touch with the surrounding circumstances and conditions, in order to determine what interpretation should be placed upon this contract.

MR. GREENE: I will admit that, your Honor, if there was any term or provision in that contract that was vague or ambiguous; but if there is not, then the court has no function of being in their places or knowing the surrounding circumstances and conditions. They have made their own contract, free from fraud and free

from mistake, and without duress; and if it is plain and definite and unambiguous, then there is no room for interpretation. The court cannot import any new terms into it by usage or custom. Judge Bean says of the contract that it is definite, certain, unambiguous, on the very issue that is now attempted to be injected into this trial. I feel that I am bound by that. And I am prepared to be heard with citations from our own Supreme Court, or anywhere else, that this is a character of contract that cannot be varied by proof of custom and usage.

COURT: I have read that opinion of Judge Bean's and gone into it pretty thoroughly, and I might say, further, I have consulted with Judge Bean about it, and I am of the opinion that that decision does not decide the exact question that is now before us.

MR. GREENE: Didn't that decide that they could not plead a custom and usage to vary that particular hop contract?

COURT: I agree with him about that absolutely, because there is no question about it. But the purpose of introducing the custom here is to aid the court in interpreting the contract; that is to say, to give the court the position of the parties at the time and the condition that prevailed at the time, so that the court may be better enabled to say what the parties meant when they drew this contract and when they entered into it.

MR. GREENE: Wherein did they fail to express what they meant, though? It seems to me plain enough. They agreed to sell 60,000 pounds of hops, the entire crop raised on certain land. How can that be denied?

You cannot change entire crop to three-quarters of crop by custom and usage.

COURT: There is another view to that. A man is not presumed to sell something that he hasn't, or never had.

MR. GREENE: That is the point where I think we differ. This is not a contest between Magnus and the Chinaman—the landlord. We are not trying to take the landlord's hops away from him. If we had brought our suit in replevin and replevined the Chinaman's hops, and he was the defendant in here on that kind of suit, then this would be relevant. The Chinaman could say, "You have no right to my hops. I got them from Bishop and Orey as my rent. My title is better than yours, because I have possession." But that is not the issue here.

MR. GREENE: If your Honor please, in addition to the objections I noted this morning to the testimony of the witness on the stand, there are two others I wish to make.

I object to the question, on the grounds, in addition to the grounds already stated, that there has as yet been no proof of any custom or usage in this case. Obviously, therefore, it is unfair to attempt to fasten knowledge on the plaintiff of some vague, indefinite custom and usage, that has not yet been testified to by anybody in this case; and the second ground is, in addition to the others urged, that no custom and usage are pleaded. The testimony sought for out of this witness is incompetent for that reason.

Now, I have said that it is not pleaded. It was

pleaded in the original answer filed in this case, while it was a law action. All of this matter concerning usage and custom and crop rentals was set up. To that portion of that answer, we introduced demurrers and motions, and it was stricken out, and demurrers sustained as to all that matter in the original answer. Then the amended answer was filed, consisting, first, of such denials as the pleader saw fit to make to the complaint, and then, as a further and separate answer and defense, the equitable defense which has already been tried and determined by this court, and directed to be dismissed.

COURT: The objection will be overruled. But I will say, as to this matter of custom and usage, the custom was set up in the original answer, and that was stricken out by Judge Bean, so that matter is not now in the pleadings, so far as the law action is concerned. The defendants in this case have amended their answer, and set up an equitable defense, and in that custom and usage were pleaded. The court, as you know, heard that equitable defense, and found, after hearing testimony, that the proof did not sustain the answer, and that disposed of the equitable matter, and with that, it disposed of the equitable answer. So there is no custom pleaded here now. I doubt very much whether the matter of custom has a great deal to do with the case. But I think the court and the jury are entitled to the situation of the parties, and they are entitled to have also what knowledge the parties had of the local situation, and I will permit that to be shown. But I don't think that the defendants are entitled to show a custom or usage under the present state of the case.

MR. HAMPSON: In order that we may be clear on this point, I will say that the defendants intend to offer proof of the existence of a custom in Oregon with respect to the leasing of lands for the purpose of growing hops, under which such leases are made on a crop rental basis. Now, that testimony can be offered as proof of a custom, or it can be offered as a fact, and the knowledge of that fact as being within the parties. It is immaterial to me how that gets into the case, but I think we are entitled to have that fact in the case. If your Honor is going to exclude such testimony upon the ground that it tends to prove a custom, and that that custom has not been pleaded, and therefore the testimony is not admissible, at this time I would ask permission to amend our answer in order to set forth such plea as would justify the receipt of such testimony. If, on the other hand your Honor is going to rule that such testimony is admissible as disclosing a fact, one to be considered in view of others, tending to show the situation of the parties and the nature of the subject-matter of this contract, then I am perfectly willing to proceed without an amendment of the pleadings.

COURT: If you amended your answer, it would have to be amended in such a way as to meet the objection that Judge Bean has ruled upon in this case, because that becomes the law of the case now. I could not permit you to amend so as to set up the same matter that he has stricken out.

MR. HAMPSON: I would not undertake, your Honor, to amend this answer to run counter to the decision of Judge Bean -- obviously not. I concede that I

am controlled by that decision, and in so far as Judge Bean has passed upon that, it does constitute the law of the case.

COURT: I think for the present I will have to hold that the custom is not a matter that can be proven here—the general custom and usage in the locality. I will overrule the objection to this question, and let the witness proceed.

To which ruling plaintiff then and there duly excepted and its exception was allowed.

The witness thereupon answered: Well, we went over all the aspects of the business—contracts, and buying hops, and growers' contracts, and dealers' contracts. We talked over the business generally.

THE COURT: By the way, wasn't there a stipulation in this case that the seller was to receive 16 cents a pound?

MR. GREENE: Yes.

THE COURT: That didn't get before the jury.

MR. GREENE: No. I think it ought to be explained to the jury, that while the contract calls for 11½ cents a pound, subsequently that term of the contract was modified, by mutual consent of both parties, so that Magnus agreed to pay 16 cents a pound instead of 11½ cents a pound. The stipulation was made on account of complaint by Mr. Bishop at picking time that, on account of the war and scarcity of labor, the price of pickers had gone up some. To meet that difficulty, Magnus conceded an additional 4½ cents.

The witness then testified: Adam Orey was associated with me in growing hops in 1916. At that time

we were cropping or held under lease five hop yards. We usually contracted or sold outright the hops grown by us in our yards. My brother, who was an employee, made a trip for me in the latter part of 1916 to sell hops. He left about December 1st and went to Chicago and New York, and called on the firm of A. Magnus Sons Company. I received a telegram from him in regard to what took place there. In 1916 and the early part of 1917, I was located in McMinnville, Oregon, and left there about June or July, 1917. I kept our records in the office there, and must have brought some of them down to Portland in a box, but evidently I misplaced them or threw them out, or something, when I left McMinnville. Have made search for them and have none of them now. Have made search for the telegram from my brother under instructions of my attorney (Mr. Hampson). Have not been able to discover it. My brother wired me in January, 1917, that Magnus was interested in three year, or term contracts, and to take it up direct; he was coming home.

Am familiar with, and in 1917 had knowledge in regard to the 45-acre tract of land situated nine miles North of Salem, in the South Prairie, owned by Hop Lee. Am also familiar with a 24-acre tract of land in the South Prairie, and was familiar therewith in 1917. The two tracts are known as the Chung and Stevens yards, respectively, and are known as the Hop Lee ranch. The 45-acre tract is the Chung yard, the 24-acre tract is the Stevens yard. Hop Lee was the owner in 1917.

(EXCEPTION NO. 2)

Q. Do you know who had the lease of those lands in 1916?

MR. GREENE: Objected to as immaterial who had the lease or anything about it. When it comes to a question of lease, I am going to object to it as immaterial, not relevant to any issue in this case. We are suing on a written contract, in which defendants covenant they have leases on these lands. We are bound by that. We admit they had leases on these lands. Everything else concerning the leases is immaterial.

Whereupon the court overruled said objection, to which ruling plaintiff duly excepted and its exception was allowed.

A. Yes, sir.

(EXCEPTION NO. 3)

Q. Who?

A. Adam Orey and W. J. Bishop.

Q. Were the leases written leases or oral leases?

MR. GREENE: Same objection as to last preceding question. Which objection was overruled by the court, and an exception to such ruling was thereupon taken and allowed.

A. The Chung yard was a written lease and the Stevens yard was an oral lease. I have been unable to find the written lease on the Chung yard although I have made an attempt to do so.

The witness continuing: I inquired of Hop Lee whether he could discover one of the originals and he

sent me up to two or three attorneys' offices in Salem to look through papers he had there, but we were unable to find them. The five years, 1915 to 1919, inclusive, were covered by the Chung yard lease.

(EXCEPTION NO. 4)

Q. What were the terms of that lease with respect to the rent to be paid to the owner, Hop Lee?

MR. GREENE: I want to renew my objection that it is immaterial and irrelevant to any issue in this case, as to the terms of that lease. They covenanted to raise these hops on leased lands and that is admitted. That is all we think relevant.

Whereupon the court overruled said objection and an exception to such ruling was taken and allowed.

A. Yes, Hop Lee was to get one-fourth of the hop crop, and we were to get three-fourths of the crop each year.

(EXCEPTION NO. 5)

Q. And what did the lease provide in a general way about the use to which the land was to be devoted?

To which question plaintiff objected on the ground that the same was immaterial and irrelevant, and the court overruled the objection, and an exception to such ruling was taken and allowed.

A. Devoted to raising hops.

Thereupon counsel for plaintiff, in order to avoid interruption by interposing separate objections to each of this line of questions, suggested that it be understood

that his objection might go to all interrogatories respecting those leases and the terms thereof.

MR. HAMPSON: My feeling about a matter of that kind is this, your Honor: That in what may be a more or less extended examination, there is an opportunity for a question to be asked and answered which is perhaps, technically, not proper, and with a general objection of that kind, there is created a possibility of error on some more or less immaterial and inconsiderable point.

MR. GREENE: Very well. I will make the objections, and I wish you would caution your witness.

MR. HAMPSON: Yes. I did speak to him at noon. I caution you not to answer my question immediately, but to give Mr. Greene an opportunity to object and permit the court to rule on it.

(EXCEPTION NO. 6)

Q. Now, state what the terms of the oral lease on the Stevens yard were?

To which question plaintiff objected on the ground that the same was immaterial and irrelevant. Said objection was overruled and an exception taken to such ruling of the court was taken and allowed.

A. Hop Lee was to get one-fourth for rent of the place, and we were to get three-fourths.

(EXCEPTION NO. 7)

Q. And in a general way, did that lease provide for the use of the land for the purpose of cultivating and raising hops?

To which question plaintiff objected on the ground that the same was immaterial and irrelevant. Said objection was overruled and an exception to such ruling was taken and allowed.

A. Yes, sir.

Witness then testified: After I received the telegram from my brother in Chicago I went to Salem, saw Hop Lee, and told him we were about to sell the hops for a term of three years, and it would be necessary to change the oral lease into a written lease, so there would be no argument about it, and I effected a written lease with Hop Lee covering the Stevens yard.

(EXCEPTION NO. 8)

Q. I call your attention to this written instrument, and ask whether that is the lease?

A. Yes, sir.

Q. Please state whose signatures those are attached to the lease?

A. Hop Lee's, Adam Orey and myself.

Counsel for defendants then offered, as defendants' Exhibit I, a written lease, dated January 24th, 1917, between Hop Lee as owner and Adam Orey and W. J. Bishop.

Plaintiff objected thereto as irrelevant and immaterial, and its objection was overruled. An exception to the ruling of the court was taken and allowed.

Said defendants' Exhibit I is as follows:

THIS MEMORANDUM OF AGREEMENT made and entered into in duplicate this 24th day of Jan-

uary, 1917, by and between Hop Lee, of Salem, Oregon, hereinafter known as the lessor, which term shall include his heirs, executors, administrators and legal representatives, and Adam Orey and W. J. Bishop, of Salem, Oregon, hereinafter known as the lessees, which term shall include their heirs, executors, administrators and legal representatives, WITNESSETH:

That for and in consideration of the annual rental to be paid by the lessees to the lessor as hereinafter provided, as well as in the observance of the conditions, covenants and stipulations herein contained to be observed upon the part of the parties herein, the lessor agrees to rent, let and lease to the lessees, and the lessees agree to take, lease, and rent from the lessor those certain farm premises belonging to the lessor situated in South Prairie Bottom, about eight miles north of Salem, in Marion County, Oregon, said property being commonly known as "The old John Hamilton place"—and containing about 31 acres of land more or less, said property to include the hop house, dwelling house, hop kiln and other buildings situated upon said real premises, to have and to hold the above described property unto the lessees for the period of five (5) years, to-wit: from January 24, 1917, until January 24, 1922, subject of course to the conditions herein contained.

It is understood by the parties herein that there is situated upon said real property a hop yard consisting of some 21 or 22 acres of land, and the lessees herein agree to tend, handle, manage and operate said hop yard during the continuance of this lease, and they agree that in the handling and operating of the same to plow, har-

row, cultivate and care for the same in a good husbandman-like manner and in a manner approved by successful hop growers in the vicinity in which said real premises are situated. Said property is to be plowed and harrowed each way not less than twice a year and such additional times as the lessees feel necessary to care for the same in the manner above provided. The wiring of said hop yard and the placing of the necessary poles to keep the same in good condition, grubbing and hoeing the said yard shall be looked after by the lessees in order that said yard may receive proper attention. The lessees also agree to spray the hops raised on said property at seasonable times each year during the life of this lease, and all teams, tools, implements, labor, spraying material or whatever else necessary in the caring, growing and harvesting of said hops shall be furnished by the lessees herein without any expense upon the part of the lessor, except as herein specifically provided.

The lessees are to have the use of the dwelling house now situated upon said real property as well as all other buildings located thereon and said lessees shall have the right and permission to cut from the timber upon said property all wood necessary to be used by them for fuel purposes or for the purpose of drying and caring for the hops as well as such poles and material necessary to be used in the said hop yard, or in the fences surrounding or subdividing said property. It is agreed that should the fences or any of the buildings located upon said real property require repairing during the life of this lease, that the lessor shall furnish the necessary material to

be used for said purposes and the lessees shall perform the work necessary in the repair of said fences or buildings without cost to the lessor.

As rental for the use and enjoyment of said property the lessees shall deliver to the lessor one-fourth (¼) of all hops produced from said real premises each year during the life of this lease, and said hops are to be baled by the lessees before delivery and shall be delivered by them at one of the near-by boat landings in Marion County, Oregon, at a time designated by the lessor.

The lessees shall not assign nor transfer this lease without the written permission of the lessor first had and obtained. Either of the parties herein shall have the right to insure their hops which are upon said real premises at any time, but the expense of said insurance shall be borne by the party who carries such insurance. The lessor shall have the right to enter upon said real property at any time for the purpose of inspecting the same.

On condition that the covenants of this lease are observed upon the part of the lessees they shall have peaceful possession of said real property and all and every part thereof and of the buildings located thereon during the continuance of this lease, and at the expiration of this lease they shall surrender up possession of said real property to the lessor without any written notice to vacate the same to which they might be entitled by law. The said lessees shall commit no unnecessary waste or damage, or suffer the same to be committed to said property during the life of this lease.

IN WITNESS WHEREOF we have hereunto set

our hands and seals this the day and year first above written.

Hop Lee, Lessor.
Adam Orey,
W. J. Bishop, Lessees.

Witness then testified: The old John Hamilton place, referred to in said lease, is the same tract of land referred to as the Stevens yard.

(EXCEPTION NO. 9)

Q. State whether or not, Mr. Bishop, during the years 1917, 1918 and 1919, covered by this written lease, and during the same years covered by the written lease on the Chung yard, Orey and Bishop did or did not deliver to Hop Lee one-fourth of the hops grown on those yards?

To which question plaintiff objected on the ground that the same was irrelevant and immaterial. The objection was overruled and an exception to such ruling was taken and allowed.

The witness answered: We delivered one-fourth of the hops to Hop Lee during each of the years 1917, 1918 and 1919.

(EXCEPTION NO. 10)

Q. Now, Mr. Bishop, after the negotiation and execution of that lease, what did you next do with respect to entering into the contract on which this law-suit is now being brought?

Said question was objected to by plaintiff as incompetent, irrelevant and immaterial. The objection was

overruled and an exception to the ruling was taken and allowed.

A. I went back to McMinnville, and by telegram, offered the hops to Magnus, that is, our hops we had grown. I wired Magnus January 24, 1917, when I got back from Salem, after writing up the lease with Hop Lee.

(EXCEPTION NO. 11)

MR. HAMPSON: I now offer that in evidence as defendants' Exhibit 2.

MR. GREENE: Objected to as incompetent, irrelevant and immaterial. Here is a written contract entered into by the parties. Unless a mistake is shown, that is not in issue here, unless the validity of the contract is questioned, that is not in issue here,—no testimony in regard to preceding negotiations is admissible. On that ground we will object to it.

THE COURT: The objection is overruled. And the court is allowing this to go in evidence, not for the purpose of proving what the contract is, but for the purpose of informing the court and jury as to the condition and situation of the parties prior to entering into this contract, and to show the circumstances which led up to the contract, and all for the purpose of enabling the court to interpret the contract in the light of the conditions and circumstances that existed at the time the contract was entered into.

MR. GREENE: I appreciate, of course, the reason on which your Honor admits it, and your Honor

will appreciate my reasons for preserving my record. And then I will interpose an objection to it on that ground, for the reason that the contract pleaded here and admitted is not susceptible of interpretation or construction; and these documents or any other evidence of extraneous matters preceding the execution of the contract is not necessary for that purpose.

Plaintiff's objection was overruled, and an exception to the court's ruling was taken and allowed.

Said defendants' Exhibit 2 was read in evidence as follows:

"McMinnville Org 23

Stamped

1917 Jan 24 AM 1 15

A. Magnus and Sons

Randolph Chicago Ill.

We offer you sixty thousand pounds three years at eleven half FOB our own leased yard written on regular growers contract mentioning primes yard we wish to sell heavy producer always spray and usually produces prime to choice quality was contracted Hugo Lewi last year Rosenwald year before. Wire direct

Bishop Bros."

Continuing, the witness said: I had the Chung and Stevens yards, which together form the Hop Lee ranch, in mind when the contract described in this law-suit was written. Those yards are located in South Prairie Bottom. By bottom I mean there are two classes of hop yard, bottom lands and uplands yards. During normal years the production of bottom hop lands is usually

about 1500 pounds to the acre. When I sent the telegram to Magnus I was familiar with the capacity of the Hop Lee ranch under normal conditions.

(EXCEPTION NO. 12)

Q. State what the capacity of the Hop Lee ranch was?

To this question plaintiff objected on the ground that the same was irrelevant and immaterial. The court overruled said objection and an exception to such ruling was taken and allowed.

The witness answered. There was something over 60,000 pounds on the Chung yard the year before. I don't know the exact production of the Stevens yard, but it was always known as a heavy yard. I know that the crop had never been picked in entirety until we ran the yard. The capacity of the two yards together under normal conditions is from eighty thousand to one hundred thousand pounds. I am familiar with the technical phrases used by hop men in the transaction of their business.

(EXCEPTION NO. 13)

Q. In this telegram, the phrase "regular growers contract" is used. Has that, or has it not, a technical meaning in the hop business?

MR. GREENE: Objected to as incompetent, irrelevant and immaterial. That word does not appear in the contract in suit, and moreover, it does not need an interpretation.

The court overruled said objection and an exception

to the ruling was taken and delivered.

A. It has a technical meaning.

(EXCEPTION NO. 14)

Q. Are there other contracts than regular growers contracts used in the hop business?

To which question plaintiff objected as irrelevant and the court overruled said objection. An exception to said ruling was duly taken and allowed.

A. Yes, sir.

(EXCEPTION NO. 15)

Q. And what is the term used to designate the latter class of contracts?

Plaintiff's objection to this question as irrelevant was overruled by the court and an exception was taken and allowed.

A. Dealers contracts.

(EXCEPTION NO. 16)

Q. What is the meaning in the hop business—and by the hop business, I mean among the buyers and sellers of and dealers generally in hops—of the term "regular growers contract?"

Plaintiff objected to this question as irrelevant. The court overruled the objection and an exception to the ruling was taken and allowed.

A. That means that the grower is selling hops off an identical piece of ground.

THE COURT: Does that mean that they are selling hops to be grown?

A. To be grown on an identical piece of ground. If a grower signs a contract to that effect, he is signing the hops which he has title to on that identical piece of ground.

(EXCEPTION NO. 17)

Q. And wherein is such a contract different from a dealer's contract?

Plaintiff objected to this question as immaterial and irrelevant and the court overruled the objection. An exception to such ruling was taken and allowed.

A. A dealer's contract is a contract between two dealers, when no specific ground is mentioned. He can either raise the hops himself or go out on the market and buy them, or get them given to him,—any way, as long as he produces the identical amount as specified in the contract. A dealer's contract is one which covers an obligation to deliver a definite quantity of hops at all hazards. A regular grower's contract has a clause in it to the effect that an unfavorable season that could not be prevented by him, he is responsible for no more hops than he has title to on the yard, and that he grows.

MR. GREENE: Do I understand you to say that particular language is in all grower's contracts?

WITNESS: All grower's contracts, yes, sir.

THE COURT: There is a clause in this contract somewhat to that effect, but not in that language.

MR. GREENE: No, that "title to".

THE COURT: I think this contract would govern as to that.

(EXCEPTION NO. 18)

The witness then testified to receiving an answer to his telegram (Defendant's Exhibit 2), and said answer was offered in evidence as Defendant's Exhibit 3. Plaintiff objected thereto on the ground that communications and negotiations leading to a contract are merged in the written instrument and are irrelevant and inadmissible.

The court overruled said objection and an exception to the ruling was taken and allowed.

Said defendants' Exhibit 3 is as follows:

"Chicago, Ill., January 24, 1917.

Bishop Bros.
McMinnville, Oregon.

We accept your contract on sixty thousand pounds prime Oregons for three years at eleven and a half cents fob conditions as mentioned in your telegram of January twenty-third. Forward contracts promptly. Will send shipping instructions for last purchase this week sure. Awaiting reply from one customer to whom we have submitted sample.

A. Magnus Sons Company."

(EXCEPTION NO. 19)

Plaintiff then moved to strike out the Exhibit on the ground that it is not addressed to and does not concern defendants in this case, who are W. J. Bishop and Adam Orey: and moved separately to strike out both telegrams on the ground that they do not refer to the contract the defendants in this case admit having made.

The court overruled said motions and an exception to said ruling was noted and allowed.

The witness then testified: After receipt of this telegram, I wrote up the contracts and forwarded them to plaintiff. I know what the printed instrument now shown to me is. The signatures of Adam Orey, W. J. Bishop and G. G. Schumacher, are attached to it. I obtained the printed form for it in the stationery stores at Salem.

The document was introduced in evidence as defendants' Exhibit 4, and is identical with the contract referred to in the complaint and annexed thereto as Exhibit A. (Pages 5 to 11, *supra,* this Transcript.)

The witness then testified that contracts generally similar to Defendants' Exhibit 4 and covering the same land were prepared covering the years 1917 and 1918. After I secured form of contract from the stationery store in Salem, I took the forms back to McMinnville and wrote up the contract. It is in my handwriting. I signed them and Adam Orey signed them, and I then sent them to Magnus at Chicago. They were in duplicate and after they were signed A. Magnus Sons Company, G. G. Schumacher, Secretary and Treasurer, they were returned to me and I had the originals recorded and then sent them back to A. Magnus Sons Company and kept the duplicate. Myself and Mr. Orey cultivated the Hop Lee ranch described in the contract to hops during 1917, 1918 and 1919, and produced crops of hops. The hops produced in 1919 were baled up, taken to the warehouse at Hopmere, the railway station nearest to the ranch, and divided. Hop Lee and Adam Orey divided

them. The bales were lined up, we took three bales and Hop Lee took one bale, and so on until they were all divided, and until Hop Lee got his one-quarter for rent. The remaining three-quarters were shipped to A. Magnus Sons Company, either to it or to some brewer by its direction.

Counsel for defendants then made an offer of proof by the witness as follows:

MR. HAMPSON: At this time, and by this witness, the defendants offer to show that in connection with the operation of hop lands in the State of Oregon, and the conduct of the hop business in the State of Oregon, it is customary and usual for such lands to be rented or leased by the owner to tenants or lessees, on a crop rented basis; and that such crop rental leases are customary, practically to the exclusion of cash leases, or leases of any other character, to the degree of 90 per cent or 95 per cent of all leases made being crop rental leases rather than leases of any other kind. And defendants further offer to show by this witness that Magnus Sons Company had knowledge of the existence of this custom, usage or fact.

MR. GREENE: You don't want to offer the amount of rental, do you?

MR. HAMPSON: Further, in this connection, defendants offer to prove that the rental usually paid under such leases was one-quarter of the crop, although the percentage of the crop so paid as rental was subject to change under varying conditions.

The court sustained plaintiff's objection to the introduction of such testimony.

CROSS-EXAMINATION:

Witness testified that they produced a few bales over 200 in 1919 and shipped 150 and some odd bales to Magnus or their order. Could not state exactly how many. Turned over fifty odd bales to Hop Lee. My definition of a grower's contract is a contract for his hops raised on a particular and specific piece of ground for a particular year. That is all I wish to say about it. I don't know how many pounds of hops the Chung yard or the Stevens yard produced in 1919, because we dried them all in the same house. The two together in normal years produce 80,000 to 100,000 pounds of hops. They produced about 40,000 pounds in 1919. The 1918 crop was only half picked. In 1917 they produced about 50,000 pounds, in 1920 about 50,000 pounds and in 1921 in the neighborhood of 50,000 pounds. 1917 was a very abnormal year, very dry. We got 50,000 pounds that year. In 1918 the hops were left on the vines, which absolutely ruined the yards. We have never been able to get the roots to grow since. In 1916 they produced about 60,000 pounds. I don't know just to the pound how much the Chung yard produced. Under normal conditions means normal climatic conditions, and normal working conditions. We haven't had that kind of normal conditions since 1916, nor since the war started. In my telegram to plaintiff (Defendants' Exhibit 2) by "our own leased yards" I referred to the yards which our A. C. Bishop had talked to the Magnuses in Chicago about. He had wired me, and I had already instructed him before he left here what to talk about. We were operating five leased yards that year, on crop

rental, four in Marion County and one in Polk County. I told my brother to solicit the business of A. Magnus Sons Company on the Orey and Bishop yards. I signed the telegram Bishop Bros. as that is my usual way of doing business. George Bishop is my brother and was a partner in Bishop Bros. but he had nothing to do with these hop yards. His name was not signed to the contracts. Did not explain to Magnus why it was not. Myself and Adam Orey had already signed the contracts on January 26, 1917, when we sent them to Magnus for signature. I wrote a letter which accompanied the contracts.

The letter, which was read in evidence by the witness and marked Plaintiff's Exhibit A, is as follows:

> "Inclosed find contracts for 3 years for 60,000 lbs. on the Chinaman's yards we are running. Kindly sign duplicates and forward back to us. You can use your own judgment about recording them, if you want you can save that expense. We have sold both to Rosenwald and Hugo Lewi several years and they saved the expense. Contracting is active. Wolk Hop Co. took 40 thousand from Geo. Yergen at 11½ and have offered this and 12 to several growers. Other dealers are offering 11 all for one year.
>
> Bishop Bros."

By the expression in the letter "the Chinaman's yards we are running," I meant these five hop yards we were working, all on crop rental, and the same amount and proportion of rental. I had conversations with August Magnus and Albert Magnus, with Albert Magnus

in Salem along in 1913, or '14 or '15. I don't know what year but it was before these contracts. We talked about hop business in general, I don't believe there was any discussion of buying or selling. I was representing Bishop Bros. as a hop buyer at the time. I have been in the hop business for 20 years as buyer, seller and commission merchant, part of the time representing La Vie & Company, who are big buyers in this market. Mr. La Vie is my uncle. Am quite familiar with hop contracts and the making of them, have filled out many of them, not many dealer's contracts. My experience has been with grower's contracts similar to this one. At the same time, for the last seven or eight years, I have been leasing and operating yards. Never bought any hops of Hop Lee before. He always had them sold when I got around. When we were turning over to him-one-fourth of the hops we raised on his land he had them sold for five years. I do not know to whom. I talked with August Magnus in Chicago some years before these contracts were signed, in 1914, '15 or '16, about hops and of the business in general, condition of the crop, prices, etc. Made an effort to sell him some old hops, the previous year's crop, in 1916, but he was not interested in hops at all. Our talk was of the hop business in general, shop talk between dealers in the same business. The only thing I recall is that I was trying to sell Mr. Magnus six or seven thousand bales of old hops that had been laying here for a couple of years. Have no recollection of any reference in that conversation as to whether the hops had been grown on renter's land or owner's land. Mr. Magnus was not interested in any of

it when I talked to him. He was sick. Subsequently, later on, he wrote some contracts, the contracts in this suit and other contracts. I had not a very strong acquaintance with them. I merely dropped in when I went through Chicago, possibly for an hour or two; and met them for an hour or two when they were in Oregon. Albert Magnus was here two times to my knowledge within the past 20 years. I talked to him both times possibly an hour alone. He is the only Magnus I ever talked to on the Coast; saw August Magnus only at his office in Chicago. I talked to Albert Magnus here in latter part of August, 1919, after this contract was executed, that is the time he allowed the increase in the price, all dealers were allowing the increase. We had not picked the hops yet, or were just starting to pick.

A. C. BISHOP was thereupon called as a witness for defendants, and being first duly sworn, testified as follows:

I am a brother of W. J. Bishop who was just on the witness stand. Have been employed by him. First went to work for him 10 years ago and have been in his employ continuously except two years I was in France. Was employed by him in 1916 and part of 1917. My duties were to buy, sell, help work in the yards. Went East four trips to New York. Made a trip East in December, 1916.

(EXCEPTION NO. 20)

Q. And what were you instructed to do by your brother in connection with that trip?

Plaintiff objected to said question as irrelevant and

immaterial. The objection was overruled and an exception was taken and allowed to the ruling of the court.

A. I had a number of hops under my arm—samples, and order to sell; also had orders to sell some contracts, which was grown on Orey and Bishop's yards, and other yards, to sell them to dealers in the East. If they were in position to take them I would have closed the deal right there, and did close a couple of deals. By closing a deal I mean arranging a contract, and wiring my brother, and the taking care of it, and taking it up direct with them.

Continuing the witness said: I was in Chicago during that trip, on my return from the East, between the 10th and 15th of January, 1917. I left New York after New Years, don't recall the exact date. I know the firm of A. Magnus Sons Company, on Randolph street in Chicago. I called there to try to sell them some hops. I saw three of the Magnusses and was introduced to Mr. Schumacher. Conversed with the Magnusses about the hop business in general, also spot hops and contract hops. Spot hops are hops of the previous years's crop, on hand and in the bale at that time.

(EXCEPTION NO. 21)

Q. And what do you mean by contract hops? What was the nature of your conversation? State to the Court and jury what took place?

MR. GREENE: Objected to on the ground that was heretofore interposed to similar interrogatories to Mr. W. J. Bishop. He is offering testimony of negotiations leading up to a contract. It is a written con-

tract, and the law presumes that all negotiations and conversations leading up to that contract are bound, embodied and merged therein, and no evidence is admissible of matters preceding the contract.

The court overruled said objection, to which ruling plaintiff excepted, and the exception was allowed.

A. I went in there with the intention of selling them some spot hops—I think I did; and also asked them if they were interested in contracts, which they were, at the present time.

Continuing the witness said: By "they" I mean the Magnusses. At that moment they could not give me any definite answer. But I immediately wired my brother telling him that they were interested in some term contracts. I also talked to them about contracts which were to be written, off the yards that my brother runs.

(EXCEPTION NO. 22)

Q. And was there any conversation in regard to what these yards were, or your brother's connection with these yards?

To which plaintiff objected on the ground that said question was irrelevant and incompetent. The court overruled the objection and an exception was taken and allowed.

A. No, sir; only that they were my brother's yards. I didn't know which ones that he was going to sell them.

(EXCEPTION NO. 23)

Q. Was there any conversation in regard to the ownership of these yards?

To which plaintiff objected as irrelevant and incompetent. The court overruled the same and an exception was taken and allowed.

A. Yes, sir. I told them the yards were leased.

THE COURT: Did you tell them the terms?

A. Yes, sir.

(EXCEPTION NO. 24)

Q. (By Mr. Hampson): What were the terms as you told them?

Plaintiff objected on the ground that the terms were embodied in a written contract, and there is no mistake or fraud alleged concerning that contract. The conversation in all inadmissible and irrelevant.

The court overruled said objection and an exception to the ruling was taken and allowed.

A. I told them specifically that we didn't own any of the yards that I was trying to sell; that we had them all on crop rentals.

(EXCEPTION NO. 25)

Q. For how much rent?

Objection by plaintiff on the ground that said question was irrelevant and incompetent and was overruled by the court, and an exception was taken and allowed.

A. One-quarter rental.

Witness continuing said: I was in conversation with the Magnusses about an hour and a half. They introduced me to Mr. Schumacher. He was in another little room. I shook hands with him through a hole in the window. Kind of a cage opening. As a result of

that conversation I communicated with my brother, W. J. Bishop.

(EXCEPTION NO. 26)

Q. And what was the nature of that communication?

Plaintiff objected on the ground that negotiations are merged in the contract which precludes inquiry into anything preceding it. The court overruled said objection and an exception to the ruling was noted and allowed.

A. I wired him I was leaving for home that evening, and that Magnusses were interested in term contracts and to take it up direct.

The witness continuing said: I then left Chicago and know nothing further of the transaction of my own knowledge.

ON CROSS-EXAMINATION the witness testified: I went by there to arrange contracts by which I mean to work up new business. I had power to make a contract, only it had to be confirmed by the Oregon office. Had no power until it was confirmed by my employer. Would not have made a definite contract with Magnus; would have wired my people first. If they had authorized me to make a contract, I would have let them take it up direct first, which is what in fact I did do. I did not undertake to make a contract with Magnus. I was just inquiring. We talked over prices. I offered them contract hops at 11½ cents. My brother then operated I think four yards under lease, two others besides the Hop Lee ranch. When I told Magnus I

would make a contract at 11½ cents he was very much interested and asked me to wire immediately and have him (my brother) offer the hops direct, which I did. Magnus would not take my offer of 11½ cents. The number of pounds and amount of hops was not mentioned, but the years 1917, 1918 and 1919 were mentioned. I did not mention 60,000 or 80,000 or 40,000 or any other number of pounds, I just asked him if he was interested in some term hops. That is all I said about that specific thing or these particular yards. I didn't mention any yards in particular. I mentioned the yards that Orey and Bishop were running, without specifying any number of pounds from any particular yards, either separately or in the aggregate. After we got finished talking I told him that the ones I represented leased the yards. He asked me how we leased the yards. I told him we paid crop rents. I think he asked me how much and I told him one-quarter. Nothing was said about getting the hops belonging to the owner of the land. I introduced myself as the representative of Bishop Bros. Said nothing about Adam Orey, although at that time Adam Orey had a lease on one of these yards. Don't know whether Bishop had an interest in the lease of the Hop Lee yards at that time. I didn't know what yards I was soliciting for, only the yards my brother was interested in. I sold him some hops besides the contract hops. Did not sell all of the spot hops in New York before I got back to Chicago.

HOP LEE called as a witness for defendants, being first duly sworn, testified as follows:

I live in Oregon several years: go away; come back;

about 30 years last time. I live in Salem 29 or 30 years. Own hop land in Marion County, own Chung yard and Stevens yard, one 14 or 15 years, other about ten years. They have been planted to hops since I owned them. I owned them between 1915 and 1919. Have rented them ever since I owned them on crop rent, one-quarter of crop in the bale, renter gets three-quarters. Get my quarter every time he bales he give me every fourth bale. We watch it; every fourth bale we take one bale. I know Mr. Bishop, he occupied the yard. I know Adam Orey. Orey and Bishop had a lease on Chung yard and Stevens yard. Lease on Stevens yard cover five years, 1917, 1918, 1919, 1920, 1921. Lease Chung yard five years, but run out in 1919. Both leases same kind, I got one-quarter of crop each year and sold to another man, not Bishop and Orey. Made contract with him before I rent to Bishop and Orey. Never sold hops to them. Always get one-quarter of the crop for rent.

ADAM OREY, called as a witness for defendants, being first duly sworn, testified as follows:

I am one of the defendants in this case, live in Salem, have been a farmer all my life, the last nine or ten years raising hops. Part of that time in partnership with W. J. Bishop in the Chung and Stevens hop yards. Have known those yards about seven years. Had a lease on the Chung yard beginning in 1915 running five years. The Chung and Stevens yards are two or three miles apart, but are operated in connection with each other. The lease on the Stevens yard was for five years, 1917, 1918, 1919, 1920 and 1921. I handled the farming end of my partnership with Mr. Bishop and lived on one of

the ranches superintending the production and cultivation of the hops. I had nothing to do with the selling of the hops. Never sold a pound of hops except hops that I actually grew myself. I did not know Magnus Brothers before this contract was entered into and know none of the details in connection with the contract. I am reasonably familiar with the capacity of the Chung and Stevens yard for producing hops, have known it for the last seven years. Their capacity is 1200 to 1500 pounds to the acre in normal conditions, or about 70,000 or 80,000 pounds for the two yards. In 1915 they produced a little over 60,000 pounds, somewhere between 60,000 and 70,000 pounds. In 1916 we didn't pick quite all of them, we got better than 60,000 that year. In 1915 and 1916 we didn't have the Stevens yard. The Chung yard produced about 60,000 pounds in 1915 and about the same in 1916. In 1917 it was about 50,000 pounds on both yards. That was a bad hop year, bad for help and bad on account of weather. In 1918 we didn't pick all of them, picked about 40,000 pounds and left about the same amount unpicked, the effect of which was a damage to the yard. The production has not been normal for the last year or two.

CROSS-EXAMINATION

In one sense of the word normal means whenever the crop is a good crop it is a normal year, and whenever it is a poor crop it is an abnormal year. A normal year the crop is 1200 to 1500 pounds per acre, which means a good average crop; whenever it falls under that it is not a normal year, it is getting off. For the last four

years it hasn't been normal, it has been under that. A normal average year is just what the average—what a man would get under average conditions, and it comes about once in five or six years, that is the way it has been with us, and that has been the fact, I believe, with other hop growers in Oregon. Since this contract was made, and for two years before that, we have never produced a normal quantity of hops on those yards. The average for the last five years on the two yards has been in the neighborhood of 40,000 to 60,000 pounds a year.

RE-DIRECT EXAMINATION

I refer to the hops that were picked. In 1918 we picked about 40,000, and we left approximately about the same amount, so that if the total crop had been picked in 1918 the production of the yards would have been in the neighborhood of 80,000 pounds. The non-picking of that had a very damaging effect on the future of the yard.

RE-CROSS EXAMINATION

In 1917 the total production was about 30,000 pounds, which was not the result of non-picking the previous year. When I say that 40,000 pounds were left unpicked in 1918 it is simply a guess. We have 45 acres in hops; we don't know how many pounds there are until we pick them and weigh them. In picking a yard of that kind we do not necessarily pick the best looking parts first. In lots of cases you have thin ground, sandy ground, your hops would get overripe, you pick them first. If you have heavy ground, you are afraid of mold,

you take those first. If we leave the field half unpicked we simply guess that the unpicked portions would, if picked, have weighed about as much as the part we did pick.

R. H. WOOD, called as a witness for defendants, being first duly sworn, testified as follows:

I live at Dayton, Oregon. Am a hop grower. Have been in that business three years, but familiar with it for 18 years as a buyer and seller, and as agent of non-residents who buy hops. That has been my exclusive occupation for that time. Am familiar with the custom, usages and technical terms of the business. I know the term "grower's contract," as used in the hop business. It has a technical meaning. It has a recognized meaning given to it generally by people in the hop business. I know that meaning. A grower's contract specifies a certain piece of ground for these hops to be grown on, and if the grower does not produce the estimated amount, for instance, like this contract for 60,000 pounds, I understand he only delivers what he does raise, or his portion.

(EXCEPTION NO. 27)

Q. Is there a distinction in the hop business between a grower's contract, so-called, and what is known as a dealer's contract?

Plaintiff objected to this question as irrelevant and immaterial, there being no issue as to a dealer's contract in this case. The court overruled the objection and an exception to the ruling was duly taken and allowed.

A. Yes, there is.

(EXCEPTION NO. 28)

Q. What is the fundamental difference between the two contracts?

Plaintiff objected to the question on the same grounds urged in Exception No. 27. The court overruled the objection and an exception to the ruling was duly reserved and allowed.

A. A dealer's contract specifies a certain amount of pounds to be delivered and quality likewise, off any yard, irrespective of where the hops come from.

MR. HAMPSON: I wish to ask this witness, your Honor, the same question that I asked the witness Bishop, with regard to custom and usage, assuming, of course, that your Honor will rule as he did rule, and wish to make the same offer of proof as was given in connection with the testimony.

THE COURT: Very well. Ask the question.

MR. GREENE. You don't want to repeat the question?

MR. HAMPSON: I don't need to repeat the question, if the record may show that question was asked, the objection interposed, ruling made, and offer of proof made, exactly the same as was done with the witness W. J. Bishop.

COURT: Very well.

Objection. Exception allowed.

H. W. RAY, called as a witness for the defendants, being first duly sworn, testified as follows:

I have been in the hop business 20 years and am familiar with the customs and usages of the business, and

its technical terms. The term, "grower's contract," has a meaning or significance generally known to, and given to it by, men in the hop business. It is a contract that covers a specific piece of ground. It also carries a chattel mortgage on that particular crop of hops to protect the advances made on the contract, and the grower is not liable for more than he produces on that particular piece of ground, nor for the delivery of quality that might be specified in the contract if he didn't produce that.

HUGH NELSON, called as a witness for defendants, being first duly sworn, testified as follows:

I have been in the hop business for 20 years, and am familiar with its customs, usages and technical terms. Am familiar with the term, "grower's contract." It has a technical significance among hop men. It is an instrument in writing, entered into between a grower and a dealer, whereby the grower sells a certain amount of hops off a described piece of property, at a certain price, for a certain year; and he is not liable for any more hops than is raised on that piece of ground that year.

The defendants then rested their case.

W. J. BISHOP, by permission of the court, was then recalled for further cross-examination and testified as follows:

Of the 40,000 pounds of the crop of 1918 which we harvested, leaving about 40,000 pounds unpicked, we delivered three-quarters, or 30,000 pounds of the 40,000 pounds picked to Magnus and delivered 10,000 to Hop Lee as rental. Magnus had advanced the full percentages on the whole 60,000 pounds, 3 cents per pound for cultivation money and 5 cents a pound for picking

money. The money was advanced before we knew that we were going to leave the hops on the yard.

(EXCEPTION NO. 29)

Plaintiff then asked the witness what was the market price of hops that year, and an objection by defendants to the question was sustained by the court.

Plaintiff then offered to prove by the witness that the market price of hops in 1918, the only year under the contract when the yards produced as much as 80,000 pounds of hops, was as low or lower than the contract price, and during all the other years under the contracts, when the production was under 60,000 pounds, the market price of hops was very much higher than the contract price.

The court sustained an objection to said offer of proof and an exception to the ruling was duly reserved and allowed.

G. G. SCHUMACHER was thereupon called as a witness for plaintiff in rebuttal and testified as follows:

As fast as we make these contracts with growers we make sales to brewers and others at the market price on the day of sale, relying upon the growers' contracts with us to fulfill our contracts with the brewers. In case growers default with us we have to go in the open market and cover ourselves. The 60,000 pounds of hops in the defendants' contract for the year 1919 were resold by us on dealer's contracts with the brewers at 15 cents per pound.

CROSS-EXAMINATION

We sold these hops to several brewers in Chicago; Keeley Brewing Co., Chicago, was one. We sold them 20,000 shortly after we made this contract. I think it was a term contract we sold them. We handle 3000 or 4000 bales of 200 pounds to the bale in a year, about 800,000 pounds in a year. We bought these hops in 1917, five years ago. Have handled four million pounds of hops since then. To the best of my recollection I undertake to say that we sold 20,000 pounds of those hops in 1917 to the Keeley Brewing Co. for 15 cents a pound. We sold the remaining 40,000 pounds of this contract at about the same price, but I don't remember to whom. I can recall the price we received, although I don't remember the purchaser, because I know pretty near the margin of profit that we aim to make on our sales. In a general way when we buy hops we sell against the hops we had bought and my testimony is in view of that fact. These particular hops were not mentioned in the Keeley Brewing Co. contract; they didn't know they were getting hops off the Orey and Bishop yard nor from where they were getting them. We sold 20,000 pounds of hops to the Keeley Brewing Co., any hops, we agreed to deliver at a certain date hops of a certain quality, at a certain price. In other words, we made a dealer's contract with them and didn't identify the Orey and Bishop hops in any respect. We sold 20,000 pounds of some hops.

RE-DIRECT EXAMINATION

We base our sales to brewers on market price on day

of sale and sell hops that we contract for or purchase. When we make a purchase or a contract we immediately endeavor to make sales against such purchases or contracts, at the market price on that day.

RE-CROSS EXAMINATION

When we enter into contracts of this kind we guard ourselves against a shortage of production. In contracts such as this one, for a maximum of 60,000 pounds we don't sell against them up to the full amount, we make allowance for the shortage that frequently exists. We instruct our buyers to be careful and not contract for the entire crop and protect ourselves in that way. When we entered into this contract we did not sell the full 60,000 pounds. I only remember the sale of 20,000 pounds and it is possible that is the only amount we sold against this contract.

RE-DIRECT EXAMINATION

We usually hold back one-third on these contracts for protection in making dealer's sales to brewers. If the grower's contract with us is for 60,000 pounds we endeavor to resell two-thirds of that or 40,000 pounds to the brewer, having first instructed our buyers not to buy up to the full capacity of the yard, in making the contract with the grower.

RE-CROSS EXAMINATION

Under our method of doing business and to guard against overselling, we would not in any event have sold

more than 40,000 pounds against this contract. We made other sales besides the 20,000 pounds, but I don't recollect them. To the best of my recollection in 1917 we sold against this 1919 crop. The matter has been pretty fresh in my memory the past three years on account of this litigation and dispute. The dispute started in November, 1919, the litigation in March, 1920.

Thereupon the plaintiff offered the deposition of AUGUST MAGNUS, a witness on behalf of the plaintiff, who testified as follows:

I reside at 650 Sheridan Road, Winnetka, Illinois. Am president of A. Magnus Sons Company, dealers in hops, brewers' machinery and supplies. The business was established in 1867. I know W. J. Bishop. Plaintiff had dealings with defendants in 1917, 1918 and the last in 1919. We entered into a written contract with them for the purchase of 60,000 pounds of hops at 11½ cents a pound. In 1919 the contract price, by mutual consent, was increased to 16 cents a pound. They offered us by telegraph a three year contract for 60,000 pounds of hops to be delivered each year at 11½ cents a pound, subject to general grower's contract. We telegraphed an acceptance of the contract and asked them to forward the agreements, which they did. The contract was signed by the defendants prior to its receipt by us. We signed the contracts in duplicate and returned them to defendants for record. Mr. Bishop's brother, A. C. Bishop, was here once or twice prior to 1919, who represented the defendants. We had a conversation with him on the subject of hops generally, but not in reference

to the subject matter of the contract. Nothing was ever said by the defendants or by any representative of the defendants, prior to the execution of the contracts, with reference to the plaintiff receiving anything else than the entire output of hops upon the land specified in the contract up to 60,000 pounds, or anything which would lead the plaintiff to believe that they were to receive anything less than the entire output from the parcel of land specified, up to 60,0000 pounds. At the time of the execution of the contract we believed we had contracted for 60,000 pounds of hops, and neither the defendants nor their agent intimated anything to the contrary. The contract as executed contains all of the terms and conditions as understood by plaintiff and defendants prior to or at the time of its execution, excepting the bonus that we subsequently added of 4½ cents a pound in price, which was not in writing. Referring to the next to the last paragraph in the contract, where the seller mortgages the entire crop of hops to the purchaser, nothing was said at any time by any of the defendants or by anybody representing the defendants that the mortgage was to cover only the share of defendants in the crops raised upon the land described in the contract.

QUESTION: At the time that this contract, which has been received in evidence, was executed, did you have any knowledge as to whether the defendants owned this land, or whether the land specified in the contract was leased land?

ANSWER: It was leased land.

Q. Do you know anything about the terms and conditions of that lease?

A. No.

Q. Did you have any knowledge that the lease provided that the defendants were to have as their share three-quarters of the output of hops, and that the landlord was to have one-quarter as his rental?

A. No.

Q. Did you have any information at that time as to the kind of lease it was?

A. No.

Q. That is, with reference to whether it was a crop lease or a cash lease?

A. No.

Q. Was anything ever said by any of the defendants with reference to their contracting to sell only their share of the hops under the 1919 contract?

A. No.

Q. At the time that the contract was executed or prior thereto, was anything said by defendants about three-quarters of the crop or that 60,000 pounds as specified in the contract meant that amount out of the defendants' share of the crop?

A. No.

Q. As a matter of fact, Mr. Magnus, what did the plaintiff believe at all times that they were contracting for, with reference to the hops, the subject matter of this contract?

A. We expected sixty thousand pounds, as per contract.

Continuing, the witness testified: I believe all the hops raised on the land described in the 1917 and 1918 contracts were delivered to plaintiff. Defendants have not at any time intimated otherwise, and if it should develop that all the hops under the contracts of 1917 and 1918 had not been delivered, plaintiff would bring suit for recovery. Plaintiff has performed all the terms of the 1919 contract, made the advances to defendants as therein required, and has demanded delivery of the difference between the amount actually raised on the land and the amount delivered under the 1919 contract. Defendants have refused to deliver such difference.

CROSS-EXAMINATION

I have been in Oregon, but I have not seen these lands. I did not personally see the defendants in connection with the 1917, 1918 and 1919 contracts when I was in Oregon. Do not know what the Hop Lee ranch in South Prairie was other than as described by Bishop and Orey when they submitted the contract. Have frequently made contracts for hops for the amount of hops in pounds that the seller was to receive from his lands, but such contracts were not made with the knowledge that the seller was entitled to only a portion of the crops raised on his lands. I never to my recollection made any contracts with any seller for only the portion he was to receive from the land. We have made contracts with growers who have rented for a portion of the crops raised on the farm, and in those cases we protected ourselves, as we sold the hops at the time we purchased

them, or as soon thereafter as we could, and tried to keep the amount in line so that it would not jeopardize our interests. It did not happen often, and it is not quite common that the seller receives three-quarters of the crop and the landlord one-quarter. Bishop was a hop dealer. He offered us 60,000 pounds of hops on contract; whatever he raised over that he could do as he liked with.

QUESTION: His land was leased?

ANSWER: So far as whether his farms were leased is concerned, we knew nothing of it, or as to the terms of the lease.

Q. He was to deliver 60,000 pounds of hops irrespective of what the terms of his lease might provide?

A. Irrespective of what the terms of his lease were.

Q. So that your contract with him did not contemplate that he was to give you all his hops, or all the crop of hops, that was raised on his land?

A. It was contemplated that we were to receive up to 60,000 pounds of what he raised.

Continuing, the witness testified: Under the contract of January, 1917, we received 36,277 pounds. In 1918 we received 28,805 pounds and paid 3½ cents per pound for the difference between the thirty-one thousand and approximately two hundred pounds, to make complete the 60,000 pounds. By the difference, I mean in 1918 they only picked 28,805 pounds. In 1918 prohibition came; 28,805 pounds is what we got. We paid 3½ cents a pound for the balance of the 60,000 pounds not picked; they were left on the vines, which was agreeable to defendants. That is, they did not pick the full

crop. In other words, they released us from the contract and we paid them 3½ cents a pound for the difference between what they had picked and 60,000 pounds.

RE-DIRECT EXAMINATION

We have made contracts with growers, but such contracts are not usual. We usually contracted for less than they raised, in order to protect our sales. In such a contract as that there was not a question of the landlord being interested at all. We rarely made contracts —I do not recall making any contracts with landlords, without responsibility.

THEREUPON, on January 12, 1922, both sides rested, and the following proceedings were then had, to-wit:

THE COURT: The court will now decide this matter that has been argued, touching the interpretation of this contract.

We will first review the contract, in order to get at its terms to the extent necessary for the decision of this case.

This is a contract that was entered into between Adam Orey and W. J. Bishop and A. Magnus Sons Company; Orey and Bishop being designated in the contract as the sellers and A. Magnus & Sons Company as the buyer. The contract provides that the sellers, for and in consideration of a nominal sum, agree to sell and deliver to the buyer 60,000 pounds of hops of the crop to be raised and grown by the sellers on certain premises. Those premises are known as the Stephens

yard and the Chung yard. It is further stipulated that the hops are to be prime in quality. The amount advanced on these hops was $1800. That was agreed to by the terms of the contract. It was the equivalent of 3 cents per pound on 60,000 pounds. Then it was further stipulated that, for picking purposes, the buyer should advance the further sum of 5 cents per pound; and then, upon acceptance of the hops, if up to the quality stipulated in the contract, there should be paid by the buyer to the sellers the further sum of 3½ cents per pound, which would make the entire amount agreed to be paid for the hops, namely, 11½ cents per pound. There is a stipulation in the contract as follows:

> "For the purpose of obtaining the money provided for in this contract, the seller represents to the buyers, that they lease the above described property, which is free from all encumbrances."

Then it is further stipulated that, in case of loss of the hops by fire or wind or otherwise, the sellers will repay to the buyer the amount of money that has been advanced upon the crop. It is further agreed that:

> "If the seller should sell said hops, or any part thereof, in violation of the terms of this agreement to any other person or persons or refuse to deliver the same to the buyers, as herein agreed, or otherwise fail to perform the terms and conditions of this contract, to be kept and performed by him, the buyers not being in default, in the terms and conditions to be by them kept and performed, the buyers shall be entitled to receive, in addition to all advances made and interest thereon, as herein speci-

fied and agreed, as liquidated and ascertained damages for such breach on the part of the seller the difference in value between the contract price of said hops, as herein specified, and the market value thereof of the kind and quality in this contract mentioned."

That stipulation is for the purpose of fixing liquidated damages in the case, and those damages were to be the difference between the contract price of the hops and the price of the hops at the date of delivery, namely, on the 31st day of October, 1919. Then there is another stipulation, in this language:

"And inasmuch as the buyers have agreed to make certain advances under the terms of this contract, relying upon the promises of the seller herein contained, the seller for the faithful performance of this contract and as security for the advances which the buyers may make and for such damages as they, the buyers, may sustain by reason of the default of the seller, does hereby bargain, sell, pledge and mortgage to the buyer the entire crop of hops to be raised upon the premises above described in the year 1919, and does authorize and empower the buyers, upon such default or breach of the seller to foreclose this agreement as a mortgage, and it shall be lawful for such person, his agents or assigns to take immediate possession of said property and to sell the same at public auction, after giving notice of the same as is given by the sheriff on the sale of personal property on execution."

Then there is other language, which looks to the completion of the sale, and the application of the proceeds of the sale to the payment of the advances and [illegible] damages.

The contract closes with this clause:

> "It is further agreed that the seller shall not be responsible for any default in the provisions of this contract, excepting to repay advances and interests thereon, by reason of shortage of the crop of hops raised upon said premises, if such shortage be occasioned by unfavorable season and could not be for that reason prevented by him."

Now, I have recited all of the terms of the contract which I deem to be essential for the decision of the question before me.

The testimony which has been offered in this case, in order to show the conditions then prevailing and the situation of the parties, may be epitomized as follows:

A. C. Bishop, who is a brother of the Bishop who entered into the contract, went to Chicago immediately prior to the time that this contract was entered into, and he testifies that he had a conversation with one of the Magnuses, and that he then and there disclosed to Magnus the fact that the Bishop Brothers—they were talking then under the name of Bishop Brothers—desired to sell hops, to be grown under a grower's contract, and he relates that at that time he disclosed to Magnus the fact, not only that the hops were to be raised under a grower's contract, but the conditions of the lease, namely, that the growers were to enter into a lease for these lands, and that the conditions of the lease were

that the growers should pay the lessor a one-fourth interest in the crop; that is to say, it was to be a cropping contract, on shares, by which the growers would pay to the lessor one-fourth of the hops grown.

Now, it is argued that, as Magnus has testified that he knew nothing of these conditions, the court would not be warranted in giving Bishop's testimony full credence. However, from all the circumstances of the case, I am led to believe that Bishop was telling the truth about it. Magnus himself has contradicted himself in the testimony which he has given here. I mention one particular only. He testified in his examination in chief that he knew that the crop was to be produced from leased land; but on cross-examination, he testified as follows:

> "Q His land was leased? A. So far as whether his farms were leased is concerned, we knew nothing of it, or as to the terms of lease."

So that there is a very plain contradiction in his own testimony; and, from the surrounding circumstances, as to what happened, and as to the manner in which the contract was finally executed, or as to the things which led up to the execution of the contract, I am inclined to believe Bishop's testimony. I therefore take it that Mr. Magnus, representing A. Magnus Sons Company, knew at the time this contract was entered into that the defendants in this case were producing these hops from leased lands, and that he also knew the terms upon which the lands were leased; that he knew it was a cropping lease, and that the lessor was to receive a one-fourth interest in the crop.

Now, then, Bishop testifies that he telegraphed his

information to Bishop Bros. That information was acted upon by Bishop Bros., and the testimony of W. J. Bishop is to the effect that, before making the contract, he entered into the contract of leasing with Hop Lee, in order that he might be such an owner as would warrant him in making a contract for the sale of the hops. Upon receiving that information and obtaining the lease for the premises upon which the hops were to be grown. Bishop Bros. telegraphed to A. Magnus Sons Company as follows:

> "We offer you sixty thousand pounds three years at eleven half fob our own leased yard written on regular growers contract mentioning primes. Yard we wish to sell heavy producer, always spray and usually produces prime to choice quality. Was contracted Hugo Lewi last year, Rosenwald year before. Wire direct."

Now, that contains the information that the lands were leased; and that is prior to the execution of the contract. A. Magnus Sons Company thereupon wired to Bishop Brothers:

> "We accept your contract on sixty thousand pounds prime Oregons for three years at eleven and half cents fob conditions as mentioned in your telegram of January twenty-third. Forward contracts promptly. Will send shipping instructions for last purchase this week sure. Awaiting reply from one customer to whom we have submitted sample."

The contract was prepared by Bishop in the language in which we find it now, and was signed by Orey and Bishop and sent on to A. Magnus Sons Company, and

A. Magnus Sons Company accepted the contract, and signed it, and sent the original back for recording, and it was so recorded.

Now, the defendants, after the crops were grown and matured, acted upon the theory that the sale was for their interest in the crop only, because the division was made that way. Three-quarters of the crop were delivered to A. Magnus Sons Company, and the other one-quarter of the crop was delivered to the lessor, Hop Lee.

It was testified also that the capacity of these yards, in normal times, was the production of 80,000 pounds of hops.

So that here you have all the testimony, I think, that would have a bearing on the controversy for the correct interpretation of this contract.

It has been stipulated here that the total amount, or the net amount which was delivered to A. Magnus Sons Company, was 28,822 pounds, that being three-fourths of the crop; and the amount delivered to Hop Lee was 9,607 pounds, that being one-fourth of the entire amount. About that there is no dispute.

Now, we come to the question of the interpretation of this contract in the light of the testimony which I have recounted.

I will say, as a premise, that the decision of Judge Bean, which was rendered upon motion to strike the complaint, was upon the face of the contract as it was then produced, and his attention was not called to the facts and circumstances and conditons prevailing at the time the contract was entered into. Construing the con-

tract as it appeared to him upon the face of it, he said that it was plain in its terms, and that the construction would follow from the language; but, as I have remarked, he was not in possession of the facts and circumstances and conditions prevailing at the time the contract was entered into. I have those facts and circumstances before me, and in that respect the conditions are different. I am passing upon a different situation from that which he passed upon at that time, and hence I say that his decision does not become the law of the case, in so far as I have to deal with it now.

We might premise, further, that it is a presumption of law that, where a contract is written and has been signed by the parties, that written instrument contains all the terms and conditions of the contract entered into between the parties.

Another rule of law is that the plain language of the contract, where it is unambiguous, is to govern, and the court will construe it by its four corners, and determine what its meaning is.

It will be noted that, by the terms of this contract, the sellers agreed to sell 60,000 pounds of hops of the crop to be raised and grown by the sellers. That does not say the whole crop. It says 60,000 pounds of the hops to be raised. The last clause of this contract provides, as I have indicated before, that in case there is a shortage of the crop by reason of unfavorable season, the sellers shall not be responsible for such shortage, and will not be responsible in any way except to repay the money advanced on the contract.

Now, this indicates that there was not an absolute

sale of 60,000 pounds of hops. There was a sale of 60,000 pounds of hops providing they were grown. That brings up the crucial question here. These yards were capable of producing 80,000 pounds of hops, and if they had produced 80,000 pounds, the defendants in this case could have fulfilled this entire contract by delivery of 60,000 pounds of hops out of their three-fourths interest in the crop.

Now, to allude to that stipluation again that it shall be 60,000 pounds of hops of the crops to be raised and grown by the sellers: It was well known to the plaintiff in this case, as well as the defendants, that defendants were lessees of the lands upon which this crop was to be grown; and it is presumed that the buyer knew that a leasing of land for the production of hops on the shares would result in the lessees having a three-fourths interest in the crop and the lessor a one-fourth interest. When we take that into account, all the parties being advised of the situation under which this lease was made, then it would be perfectly reasonable and natural to read this contract as that the sellers have sold 60,000 pounds of the crop to be raised and grown by them; that is to say, of their share in the crop to be produced; and I think that is a reasonable construction of the contract.

Now, there are other things to be taken into consideration, along with this, in construing the whole contract. I have read the stipulation as to the execution of the mortgage, and that is for the protection of the buyer, to secure the repayment to the mortgagee of all of the advances on this crop, and any damage that might be

sustained under the terms of the contract. While the language is to the effect that the sellers sell and mortgage the entire crop of hops to be raised upon the premises, that must be read in connection with the other clauses of the contract, and especially with the one that I have been construing. The mortgage provides that the mortgagee may take, in the foreclosure of the mortgage, this property into possession, and sell the same. It is a legal fact that it could not do this as to any portion except the portion that belonged to the defendants, because the lessor had an interest in the crop that could not be taken away from him in that way and sold. So that, taking in consideration the facts and conditions which the parties then knew themselves, and were in the possession of, they were aware that they could not take the lessor's interest into their possession and sell it. As to this, for the purpose of elucidating further, in construing the contract as a whole, the sellers sold, of the hops grown or to be grown by them, 60,000 pounds of the crop, or of their share in the crop to be raised. I think that is the legal and natural construction and interpretation of that contract, and I will so hold.

Under that interpretation, it would seem that the defendants are entitled to prevail in this case.

Do you make a motion for a judgment?

MR. HAMPSON: We did make a motion, your Honor, which I now renew under your Honor's ruling, for a directed verdict in favor of the defendants.

COURT: Is that in writing?

MR. HAMPSON: I have prepared a form of verdict.

MR. GREENE: I have also an instruction, in order to preserve my record on appeal, I would like to offer, and ask the court to give.

COURT: This is the form of verdict, but what I am getting at, Mr. Hampson, is, do you move for an instructed verdict?

MR. HAMPSON: We do move for an instructed verdict.

COURT: You better reduce that to writing.

MR. HAMPSON: Yes, your honor.

(EXCEPTION NO. 30)

MR. GREENE: I have mine here:

REQUESTED INSTRUCTION

The contract sued upon required the delivery by defendants to plaintiff of the crop of hops raised and grown by defendants upon the lands therein described in the year 1919. It is admitted that the defendants raised and grew 38,429 pounds of prime hops on said lands in 1919, that 28,822 pounds thereof have been delivered according to contract and that defendants have failed and refused to deliver 9,607 pounds thereof. It is undisputed that the market price of hops of said quality at Salem, Oregon, on October 31, 1919, was 85 cents per pound. I instruct you to return a verdict for the plaintiff and against the defendants for $6,628.83, the same being the value of said 9,607 pounds of hops at 85 cents per pound, less the contract price of 16 cents per pound, or 69 cents per pound, together with interest on said sum

from October 31, 1919, at the rate of six per cent per annum.

MR. GREENE: I assume your honor will deny the instruction, on account of the ruling made.

COURT: Yes. Your instruction is denied.

MR. GREENE: We save an exception. I think I will also ask this instruction, if your Honor please, namely:

(EXCEPTION NO. 31)

The jury is instructed that, if they find from the evidence that the plaintiff knew before this contract was entered into that Bishop and Orey made or intended to make a contract of sale of hops to be raised and grown on a farm or lands rented by them on a crop rental, reserving one-fourth of the crop as rent, it will be their duty to return a verdict for the defendants; but if, on the other hand, the jury are satisfied from the evidence that A. Magnus Sons Company did not know that Bishop and Orey were contracting with reference to hops to be raised and produced on leased land, or if plaintiff did not know the terms and conditions of that lease, it would be the duty of the jury to return a verdict for the plaintiff.

That puts the question of judging on a question of fact to the jury. Your Honor assumed to decide whether Magnus or A. C. Bishop was telling the truth; whereas, that is entirely and exclusively the function of the jury, to pass on a question of fact as to the veracity of witnesses. I want to get that question in the record so that it will appear that I have applied to the court to submit

that question to the jury as a question of fact, and not as a question of law to be decided by the court.

COURT: I think that is a question for the court, because it is offered solely for the purpose of aiding the court in interpreting the contract. Therefore, I will overrule your motion in that respect, and you may have your exception.

MR. GREENE: I will take exceptions separately to each of the requests.

COURT: Very well. Now, gentlemen of the jury, it becomes my duty in this case to direct you to return a verdict in favor of the defendants. The verdict is, in form, as follows:

We, the jury, duly empaneled in the above entitled court and cause, under the direction of the court, return our verdict for the defendants and against the plaintiff.

(EXCEPTION NO. 32)

MR. GREENE: May I note an objection and exception to the ruling of the court directing a verdict, as just read?

COURT: Yes. you are entitled to that.

And thereafter on the 12th day of January, 1922, based upon said directed verdict a judgment was entered in said court and cause in favor of defendants and against plaintiff to the effect that plaintiff take nothing by its said action and that defendants recover their costs and disbursements taxed at $56.60.

And now that the foregoing matters and things may appear and remain of record in this cause, I, the undersigned, trial judge, sitting at the trial of this action, sign and seal the foregoing bill of exceptions reserved

by plaintiff; and I certify that the exceptions alleged by the foregoing bill to have been taken and allowed were duly taken and allowed as therein set forth after the jury had been empaneled and while it was still at the bar; that the foregoing bill of exceptions contains all of the evidence and proceedings had in the trial of said action; that the opinion and instruction of the court is fully set out therein, and no other or further instructions were given than as noted in said bill; that this bill was served, tendered and filed within the time allowed by law and the orders of this court therefor, and the same is hereby accordingly settled, allowed and approved this 22d day of May, 1922.

CHAS. E. WOLVERTON,
District Judge.

And thereafter on the 7th day of July, 1922, there was served and filed in said court and cause the following

PETITION FOR WRIT OF ERROR

Now comes A. Magnus Sons Company, a corporation, plaintiff herein, and says that on or about the 12th day of January, 1922, this court directed a verdict against your petitioner and in favor of defendants, and upon said verdict rendered and entered a final judgment in favor of defendants and against this plaintiff, whereby it was adjudged that plaintiff take nothing by this action and that defendants recover their costs and disbursements herein taxed at $56.60; that in said judgment and proceedings had prior thereunto certain errors were committed to the prejudice of this plaintiff, all of which will appear more in detail from the Assignment

of Errors which is filed with this petition;

Wherefore, feeling itself aggrieved thereby plaintiff prays that a Writ of Error may issue in its behalf out of the United States Circuit Court of Appeals in and for the Ninth Circuit; that plaintiff may be permitted to prosecute the same to said court for the correction of errors so complained of and herewith assigned; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said court, and that an order be made allowing said Writ of Error and fixing the amount of the supersedeas bond which the plaintiff shall give, and that upon the giving of said bond all further proceedings in this court be suspended until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit.

BAUER, GREENE & McCURTAIN,
Attorneys for Petitioner in Error.

Service of the within petition by receipt of a copy thereof duly certified is hereby accepted at Portland, Oregon, this 7th day of July, 1922.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

And on the same day, and accompanying said Petition for a Writ of Error, there was filed the following

ASSIGNMENT OF ERRORS

Now comes plaintiff, A. Magnus Sons Company, a corporation, plaintiff in error in the above entitled cause, and in connection with its petition for a writ of error

therein assigns the following errors which it avers occurred on the trial thereof; and upon which it relies to reverse the judgment entered herein:

1.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop:

"Q. What aspects of the hop business were covered in your conversation with them?"

And in this regard plaintiff states that this action was brought for damages resulting from the breach by defendants of an express written contract, definite, certain and unambiguous in its terms, for the sale and delivery by defendants to plaintiff of the crop of hops to be grown in 1919 on certain lands therein described. Said contract was prepared and written by defendants and its execution as alleged in the complaint was admitted. Said witness W. J. Bishop is one of the defendants called on his own behalf to testify to the knowledge existing on the part of plaintiff's officers with respect to the customs and usages of the hop business in Oregon and had testified that he had conversed with Albert Magnus and August Magnus at different times prior to 1917 relative to the hop industry. To the question above quoted the witness was permitted to testify and did testify: "Well, we went over all the aspects of the business—contracts, and buying hops, and growers' contracts, and dealers' contracts. We talked over the business generally." (Bill of Exceptions, pp. 8-13; p. 42 *supra.*)

2.

The court erred in overruling plaintiff's objection to

the following question propounded to said witness W. J. Bishop:

"Q. Do you know who had the lease of those lands in 1916?"

In regard to which plaintiff states that said witness is one of the defendants and was called on his own behalf to testify that himself and partner Adam Orey leased the lands described in the contract of sale of the hops grown thereon which were sold to plaintiff, said contract being the contract sued upon herein and in which defendants covenant that they are lessees of the lands; and by this question witness was permitted to testify and did testify that Adam Orey and W. J. Bishop had the lease of said lands. (Bill of Exceptions, pp. 13-14; p. 48 *supra.*)

3.

The court erred in overruling plaintiff's objection to the following question propounded to said witness W. J. Bishop:

"Q. Were the leases written leases or oral leases?"

And in this regard plaintiff states that said witness is one of the defendants and was called on his own behalf to testify concerning the leasing by defendants of the lands described in the contract sued upon; that in said contract defendants covenant they are lessees of the lands, and by this question the witness was permitted to testify and did testify: "The Chung yard was a written lease and the Stevens yard was an oral lease. I have been unable to find the written lease on the Chung yard although I have made an attempt to do so." (Bill of Exceptions, p. 14; p. 49 *supra.*)

4.

The court erred in overruling plaintiff's objection to the following question propounded to said witness W. J. Bishop:

"Q. What were the terms of that lease with respect to the rent to be paid to the owner, Hop Lee?"

In respect to which plaintiff says that said witness is one of the defendants and was called on his own behalf to prove that defendants leased the lands described in the contract in suit on a crop rental basis, and witness was permitted to testify and did testify: "Yes, Hop Lee was to get one-fourth of the hop crop, and we were to get three-fourths of the crop each year." (Bill of Exceptions, pp. 14, 15; p. 49 *supra.*)

5.

The court erred in overruling plaintiff's objection to the question propounded to said witness W. J. Bishop, namely:

"Q. And what did the lease provide in a general way about the use to which the land was to be devoted?"

And plaintiff states that witness, who is one of the defendants in his own behalf, was permitted to testify and did thereupon testify: "Devoted to raising hops." (Bill of Exceptions, p. 15; p. 50 *supra.*)

6.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop:

"Q. Now, state what the terms of the oral lease on

the Stevens yard were?"

And in this regard plaintiff states that said witness is one of the defendants called in his own behalf to testify that defendants were obligated to pay the owner of the lands described in the contract sued upon a part of the hop crop grown by defendants thereon as rental; and said witness was permitted to testify and did testify, in answer to said question: "Hop Lee was to get one-fourth for rent of the place, and we were to get three-fourths" (Bill of Exceptions, p. 16; p. 51 *supra.*)

7.

The court erred in overruling plaintiff's objection to the following question propounded to said witness W. J. Bishop:

"Q. And in a general way, did that lease provide for the use of the land for the purpose of cultivating and raising hops?"

And said witness, who is one of the defendants, was permitted to testify and did testify: "Yes" (Bill of Exceptions, p. 16; p. 51 *supra.*)

8.

The court erred in overruling plaintiff's objection to the introduction in evidence, as Exhibit 1, of the written lease dated January 24, 1917, executed by Hop Lee as lessor and Adam Orey and W. J. Bishop as lessees whereby the former demised to the defendants for the term of five years from January 24, 1917, thirty-one acres situated eight miles North of Salem, Oregon, (being a part of the lands described in the contract sued upon) at a rental of one-fourth of all hops produced

from said premises each year, same to be baled by lessors and delivered at boat landing.

And in this regard plaintiff states that in and by the contract sued upon in this action defendants sold the entire crop of hops to be grown by them in 1919 on the lands described therein, of which the lands mentioned in said lease are a part, and covenanted with plaintiff in said contract that they lease the therein described property, free from all encumbrances and that they had made no other contract for the sale of any part of said crop of hops; that defendants prepared and wrote said contract for the sale of said crop of hops to plaintiff and by their answers to the complaint herein admitted its execution and terms; that said witness W. J. Bishop, who is one of the defendants called on his own behalf to produce said lease for the purpose of showing that defendants leased the lands described in the contract in suit on a crop-rental basis and that one-fourth of the crop when harvested belonged to the lessor of the lands (Bill of Exceptions, pp. 17-20; p. 52 *supra.*)

9.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop:

"Q. State whether or not, Mr. Bishop, during the years 1917, 1918 and 1919, covered by this written lease, and during the same years covered by the written lease on the Chung yard, Orey and Bishop did or did not deliver to Hop Lee one-fourth of the hops grown on those yards?"

And in this regard plaintiff states that said witness is one of the defendants and was called on his own behalf to testify that defendants leased the lands described in the contract sued upon on a crop rental basis, one-fourth of the crop when harvested going to the landlord, and that such portion of the crop had been delivered to the landlord for the years mentioned; and to said question the witness was permitted to answer and did answer: "We delivered one-fourth of the hops to Hop Lee during each of the years 1917, 1918 and 1919" (Bill of Exceptions, pp. 20-21; p. 56 *supra.*)

10.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop:

"Q. Mr. Bishop, after the negotiation and execution of that lease, what did you next do with respect to entering into the contract on which this lawsuit is now being brought?"

And in this regard plaintiff says that said Bishop is one of the defendants called as a witness on his own behalf and in answer to said question was permitted to testify and did testify as follows: "I went back to McMinnville and by telegram offered the hops to Magnus, that is, our hops we had grown. I wired Magnus January 24, 1917, when I got back from Salem, after writing up the lease with Hop Lee" (Bill of Exceptions, p. 21; p. 56 *supra.*)

11.

The court erred in overruling plaintiff's objection

to the admission of the telegram sent by the witness W. J. Bishop to plaintiffs, same being marked Exhibit 2, as follows:

"McMinnville Org 23

Stamped
1917 Jan 24 AM 1 15

A. Magnus and Sons
Randolph Chicago Ill
We offer you sixty thousand pounds three years at eleven half FOB our own leased yard written on regular growers contract mentioning primes yard we wish to sell heavy producer always spray and usually produces prime to choice quality was contracted Hugo Lewi last year Rosenwald year before Wire direct

Bishop Bros."

And in this regard plaintiff says that said witness is one of the defendants and was called on their behalf; that the said telegraphic offer and acceptance thereof led to the execution of the contract sued upon in this clause which was prepared and written by said W. J. Bishop and is definite, certain and free from ambiguities, and that said contract is admitted by the defendants in their answers filed to the complaint herein (Bill of Exceptions. pp. 21-22; p. 57 *supra.*)

12.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop, who was called to testify on his own behalf, viz:

"Q. State what the capacity of the Hop Lee ranch was."

And thereabouts plaintiff states that by the contract sued upon defendants, in definite, certain and unambiguous terms, sold and agreed to deliver the crop raised on said Hop Lee ranch in 1919 up to 60,000 pounds, or the entire crop in case the same should be less than 60,000 pounds, and it had been stipulated and admitted that the entire crop on said lands in 1919 was 38,429 pounds, of which 28,882 pounds net had been delivered to plaintiff and that 9,607 pounds of said crop had not been delivered. And said witness was permitted to testify and in substance did testify in answer to said question that there was something over 60,000 pounds on the Chung yard the year before; that he did not know the exact production of the Stevens yard, but it was always known as a heavy yard; that the crop had never been picked in its entirety until defendants ran it, and that the capacity of the two yards together under normal conditions is from eighty thousand to one hundred thousand pounds (Bill of Exceptions, p. 23; p. 58 *supra.*)

13.

The court erred in overruling plaintiff's objections to the following question propounded to said witness W. J. Bishop:

Q. In this telegram, the phrase, regular grower's contract' is used. Has that, or has it not, a technical meaning in the hop business?

With respect to which plaintiff says that a written contract, definite, certain and unambiguous in its terms,

had been made by plaintiffs and defendants, embodying all previous negotiations and communications, and said witness was permitted to answer and did answer said question as follows: "It has a technical meaning" (Bill of Exceptions, p. 23; p. 59 *supra.*)

14.

The court erred in overruling plaintiff's objection to the following question propounded to said witness W. J. Bishop:

"Q. Are there other contracts than regular growers contracts used in the hop business?"

Said witness is one of the defendants called on his own behalf and was permitted to testify and did testify in answer to said question: "Yes, sir" (Bill of Exceptions, pp. 23-24; p. 59 *supra.*)

15.

The court erred in overruling plaintiff's objection to the following question propounded to said witness W. J. Bishop, one of the defendants called on his own behalf:

"Q. And what is the term used to designate the latter class of contracts?" To which question the witness was permitted to answer and did answer: "Dealers contracts." (Bill of Exceptions, p. 24; p. 60 *supra.*)

16.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop:

"Q. What is the meaning in the hop business—and by the hop business, I mean among the buyers and sellers of and dealers generally in hops—of the term 'regular growers contract'?"

And in this regard plaintiff says that the contract sued upon was prepared and written by defendants and accepted and signed by plaintiff subsequent to the telegraphic and other negotiations between the parties; that the same is definite, certain and unambiguous, and said witness who is one of the defendants called on his own behalf was permitted to testify and did testify in answer to said question: "That means that the grower is selling hops off an identical piece of ground" (Bill of Exceptions, p. 24; p. 60 *supra.*)

17.

The court erred in overruling plaintiff's objection to the following question propounded to the witness W. J. Bishop, one of the defendants called on his own behalf:

"Q. And wherein is such a contract different from a dealers contract?"

To which question witness was permitted to testify and did testify: "A dealers contract is a contract between two dealers when no specific ground is mentioned. He can either raise the hops himself or go out on the market and buy them, or get them given to him, —any way, as long as he produces the identical amount as specified in the contract. A dealer's contract is one which covers an obligation to deliver a definite quantity of hops at all hazards. A regular grower's contract has

a clause in it to the effect that an unfavorable season that could not be prevented by him, he is responsible for no more hops that he has title to on the yard, and that he grows." (Bill of Exceptions, pp. 24-25; p. 60 *supra.*)

18.

The court erred in overruling plaintiff's objection to the admission in evidence of the telegram received by the witness W. J. Bishop from plaintiff in answer to defendants' Exhibit 2 (Assignment of Error 11, p. 109, *supra*), the same being received and marked Exhibit 3, and is as follows:

"Bishop Bros. Chicago, Ill.,
McMinville, Oregon. January 24, 1917.

We accept your contract on sixty thousand pounds prime Oregons for three years at eleven and half cents fob conditions as mentioned in your telegram of January twenty-third. Forward contracts promptly. Will send shipping instructions for last purchase this week sure. Awaiting reply from one customer to whom we have submitted sample.

A. Magnus Sons Company."

And in this regard plaintiff states that the contract sued upon was prepared and written by said witness W. J. Bishop, one of the defendants herein, after the exchange of said telegrams, and is definite, certain and unambiguous, and said contract is admitted by the defendants in their answers filed herein (Bill of Exceptions, pp. 25-26; p. 61 *supra.*)

19.

The court erred in denying plaintiff's motion sepa-

rately to strike out Exhibit 2 and Exhibit 3. And in this regard plaintiff states that Exhibit 2 is a telegram dated January 24, 1917, addressed to plaintiff and signed "Bishop Bros.", the same being set out in full in Assignment 11, p. 169, *supra,* and Exhibit 3 is a telegram dated January 24, 1917, addressed to "Bishop Bros.", signed by plaintiff, the same being set out in full in Assignment 18, p. 113, *supra,* and the contract sued upon, which is admitted by defendants in their answers herein, is between plaintiffs and defendants Adam Orey and W. J. Bishop (Bill of Exceptions, p. 26; p. 62 *supra.*)

20.

The court erred in overruling plaintiff's objections to the following question propounded to A. C. Bishop:

"Q. And what were you instructed to do by your brother in connection with that trip?"

And in this regard plaintiff states that said witness is a brother of W. J. Bishop, one of the defendants herein, and was called to testify in relation to a trip which he made to New York and Chicago in December, 1916, and to conversations with plaintiff in Chicago in January, 1917, prior to the execution of the contract sued upon in this case; and said witness was permitted to testify and did testify in answer to said question as follows: "I had a number of hops under my arm—samples, and order to sell: also had orders to sell some contracts, which was grown on Orey and Bishop's yards, and other yards, to sell them to dealers in the East. If they were in position to take them I would have closed the deal right there, and did close a couple of deals. By

closing a deal I mean arranging a contract and wiring my brother, and the taking care of it, and taking it up direct with them." (Bill of Exceptions, pp. 31-32; p. 68 *supra.*)

21.

The court erred in overruling plaintiff's objection to the following question propounded to said witness A. C. Bishop:

"Q. And what do you mean by contract hops? What was the nature of your conversation? State to the court and jury what took place?"

And in respect thereto plaintiff says that said A. C. Bishop was called as a witness on behalf of defendants to testify to a conversation he had with plaintiff's officers in Chicago relative to the sale of hops in January, 1917, prior to the execution of the written contract in suit, which is admitted by the defendants. Said witness was permitted to testify and did testify in answer to said question, as follows: "I went in there with the intention of selling them some spot hops—I think I did; and also asked them if they were interested in contracts, which they were, at the present time" (Bill of Exceptions, pp. 32-33; p. 69 *supra.*)

22.

The court erred in overruling plaintiff's objection to the following question propounded to A. C. Bishop, a witness called on behalf of defendants:

"Q. And was there any conversation in regard to what these yards were, or your brother's connection with those yards?"

Respecting this plaintiff says said witness was called by the defendants to testify to a conversation between himself and plaintiff's officers relative to a sale of hops by defendants to plaintiff held prior to the execution of the written contract sued upon, and said witness was permitted to testify and did testify, in answer to the above quoted question: "No, sir; only that they were my brother's yards. I didn't know which ones that he was going to sell them." (Bill of Exceptions, p. 33; p. 70 *supra.*)

23

The court erred in overruling plaintiff's objection to the following question propounded by A. C. Bishop:

"Q. Was there any conversation in regard to the ownership of these yards?"

And thereabouts plaintiff states that said witness was called on behalf of defendants to testify to a conversation between witness and plaintiff's officers which occurred prior to the making of the written contract sued upon, relative to the sale of hops, and said witness was permitted to testify, and did testify, in answer to said question: "Yes, sir; I told them the yards yere leased." (Bill of Exceptions, p. 33; p. 70 *supra.*)

24

The court erred in overruling plaintiff's objection to the following question propounded to A. C. Bishop:

"Q. What were the terms you told them?"

And in this regard plaintiff states that said A. C. Bishop was called as a witness for defendants to testify to his conversation with plaintiff's officers prior to the

preparation of the written contract by defendant W. J. Bishop, which is the contract sued upon in this case, and said witness was permitted to testify and did testify: "I told them specifically that we didn't own any of the yards that I was trying to sell; that we had them all on crop rentals." (Bill of Exceptions, p. 34; p. 70 *supra.*)

25

The court erred in overruling plaintiff's objection to the following question propounded to A. C. Bishop:

"Q. For how much rent?"

Respecting which plaintiff states that said witness was called on behalf of defendants to relate his conversation with plaintiff's officers leading up to the execution of the written contract for the sale of hops upon which plaintiffs began this action. And said witness was permitted to testify and did testify in answer to said question: "One-quarter rental." (Bill of Exceptions, p. 34; p. 71 *supra.*)

26

The court erred in overruling plaintiff's objection to the following question propounded to A. C. Bishop:

"Q. And what was the nature of that communication?"

In regard to which plaintiff states that said A. C. Bishop was called as a witness for defendants to testify to his conversation with plaintiff's officers in Chicago, Ill., prior to the execution of the written contract in suit, and had testified that as a result of that conversation he communicated with his brother, W. J. Bishop, one of the

defendants. The witness was permitted to testify and did testify, in answer to said question, as follows: "I wired him I was leaving for home that evening, and that Magnuses were interested in term contracts and to take it up direct." (Bill of Exceptions, pp. 34-35; p. 71 *supra.*)

27

The court erred in overruling plaintiff's objection to the following question propounded to R. H. Wood:

"Q. Is there a distinction in the hop business between a grower's contract, so-called, and what is known as a dealer's contract?"

And thereabouts plaintiff says that said witness was called as an expert in the hop business to testify to the customs and usages and meaning of terms used in the hop business in Oregon, and was permitted to testify and did testify in answer to said question: "Yes, there is." (Bill of Exceptions, p. 21; p. 77 *supra.*)

28

The court erred in overruling plaintiff's objection to the following question propounded to R. H. Wood:

"What is the fundamental difference between the two contracts?"

In respect of which plaintiff states that said witness was called by defendants as an expert to testify relative to the customs and usages of the hop business in Oregon and the meaning of terms used therein, and was permitted to testify and did testify in answer to said question: "A dealer's contract specifies a certain amount of pounds to be delivered and quality likewise, off any

yard, irrespective of where the hops come from." (Bill of Exceptions, p. 40; p. 78 *supra.*)

29

The court erred in sustaining defendant's objection to plaintiff's question propounded to W. J. Bishop as to what was the market price of hops in 1918.

And in regard to this plaintiff states that said witness is one of the defendants who was recalled in his own behalf to testify to the amount of hops produced by defendants on said lands in 1918, and had testified that they had harvested 40,000 pounds of the crop and left 40,000 pounds in the yards unpicked. Plaintiffs offered to prove by said witness by said question that the market price of hops in 1918, the only year under the various contracts between plaintiff and defendants when the said yards produced as much as 80,000 pounds of hops, was as low or lower than the contract price, and during all the other years under said contracts, when the production of said yards was under 60,000 pounds, the market price of hops was very much higher than the contract price. (Bill of Exceptions, pp. 41-42; p. 79 *supra.*)

30

The court erred in refusing plaintiff's request to instruct the jury as follows:

> "The contract sued upon required the delivery by defendants to plaintiff of the crop of hops raised and grown by defendants upon the lands therein described in the year 1919. It is admitted that the defendants raised and grew 38,429 pounds of prime

hops on said lands in 1919, that 28,822 pounds thereof have been delivered according to contract, and that defendants have failed and refused to deliver 9607 pounds thereof. It is undisputed that the market price of hops of said quality at Salem, Oregon, on October 31, 1919, was 85 cents per pound. I instruct you to return a verdict for the plaintiff and against the defendants for $6628.83, the same being the value of said 9607 pounds of hops at 85 cents per pound, less the contract price of 16 cents per pound, or 69 cents per pound, together with interest on said sum from October 31, 1919, at the rate of six per cent per annum."

And in regard to this plaintiff states that the contract sued upon was admitted by the defendants; that it was prepared and written by them and forwarded to plaintiff, who accepted and signed the same as written; that it is definite, certain and unambiguous and the facts recited in said requested instruction were stipulated and agreed to upon the trial of said cause. (Bill of Exceptions, pp. 57-58; p. 98 *supra.*)

31

The court erred after refusing plaintiff's request for the instruction set out in Assignment 30 in refusing plaintiff's request to give the following special charge to the jury, to-wit:

"The jury is instructed that, if they find from the evidence that the plaintiff knew before this contract was entered into that Bishop and Orey made or intended to make a contract of sale of hops to

be raised and grown on a farm or lands rented by them on a crop rental, reserving one-fourth of the crop as rent, it will be their duty to return a verdict for the defendants; but if, on the other hand, the jury are satisfied from the evidence that A. Magnus Sons Company did not know that Bishop and Orey were contracting with reference to hops to be raised and produced on leased land, or if plaintiff did not know the terms and conditions of that lease, it would be the duty of the jury to return a verdict for the plaintiff."

And in regard to this plaintiff states that A. C. Bishop, a witness for the defendants, testified that in a conversation with plaintiff's officers in Chicago, Ill., in January, 1917, prior to the making of the written contract in suit, he told plaintiff's officers that defendants' yards were leased on crop rentals of one-quarter of the crop (Bill of Exceptions, pp. 33, 34; Assignments of Error Nos 23, 24 and 25; pp. 116-117 *supra*); that August Magnus, one of the officers of plaintiff, with whom said A. C. Bishop held said conversation, testified that nothing was mentioned in said conversation or elsewhere, or at all, with reference to the plaintiff receiving anything else than the entire output of hops upon the land specified in the contract up to 60,000 pounds, nor was anything said which would lead plaintiff to believe that it was to receive anything less than the entire output of hops of the parcel of land specified up to 60,000 pounds; that he knew the land specified in the contract was leased land, but he knew nothing about the terms and conditions of the lease, nor that defendants were

to have three-quarters of the output as their share of the crop, nor that the landlord was to have one-quarter as his rental, and that he had no information with reference to whether defendant had a crop lease or a cash lease of the lands. (Bill of Exceptions, pp. 58-59; p. 99 *supra.*)

32

The court erred in granting defendant's request to direct a verdict in favor of the defendants, and in giving the following instruction to the jury, namely: "Now, gentlemen of the jury, it becomes my duty in this case to direct you to return a verdict in favor of defendants. The verdict is, in form, as follows: We, the jury empaneled in the above entitled court and cause, under the direction of the court, return our verdict for the defendants and against the plaintiff."

And in regard to this plaintiff states that this action was brought for damages for the breach by defendants of a written contract for the sale and delivery to plaintiffs of the crop of hops to be grown in 1919 by defendants on certain lands therein described; that defendants proposed said sale and delivery and prepared and wrote the contract and forwarded the same to plaintiff, who accepted and signed the same as prepared by defendants; that said contract is definite, certain and unambiguous; that its execution as alleged in the complaint was admitted by defendants; that on the equity side of the above entitled court, prior to the trial of this cause, defendants attempted to have the said contract reformed so as to change their agreement to sell and deliver to plaintiff the entire crop of hops grown on said lands in 1919 to

an agreement to sell and deliver only three-fourths of such crop, and the said court entered a decree denying such relief; that the only issue that remained for trial in this case, when the same was remanded to the law side, was the amount of the crop grown and harvested by defendants on said lands in 1919 and the market price of hops at Salem, Oregon, on October 31, 1919; that it was stipulated and agreed during the trial that the total crop was 38,429 pounds, of which defendants delivered to plaintiff only 28,882 pounds, and had failed and refused to deliver 9607 pounds thereof, and that the market price of said hops at Salem, Oregon, on October 31, 1919, was 85 cents per pound. (Page 99 *supra.*)

Wherefore, plaintiff prays that the said judgment be reversed and that a judgment be rendered herein by the Honorable Circuit Court of Appeals for the Ninth Circuit in favor of plaintiff and against defendants for the difference between the contract price of 16 cents per pound and the market price of 85 cents per pound of 9607 pounds of hops, to-wit, the sum of $6628.83, together with the costs and disbursements of said action and of this review.

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff.

Due service of the foregoing Assignment of Errors is hereby accepted at Portland, Oregon, this 7th day of July, 1922.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Of Attorneys for Defendants.

And thereafter the Judge of said Court made, signed, filed and entered the following

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF BOND

On this 7th day of July, 1922, came plaintiff, by Thomas G. Greene of counsel, and filed herein and presented to this court its petition praying for the allowance of a writ of error, and therewith its assignment of errors intended to be urged by it, and also praying that the amount of the supersedeas bond to be given by it be fixed and that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, it is ORDERED that said Writ of Error be and the same is hereby allowed as prayed for upon the plaintiff giving a bond as provided by law in the penal sum of $500.00; and that further proceedings in said cause in this court be suspended pending the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit.

CHAS. E. WOLVERTON,
District Judge.

And thereafter said court approved and there was filed the following

BOND ON WRIT OF ERROR

KNOW ALL MEN BY THESE PRESENTS, that we, A. Magnus Sons Company, a corporation, as principal, and Fidelity & Deposit Co. of Md., as surety, are held and firmly bound unto Adam Orey and W. J. Bishop in the sum of Five Hundred Dollars to be paid to the said Adam Orey and W. J. Bishop, their heirs. executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Signed and sealed this 7th day of July, 1922.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Oregon, sitting at Portland in said District, in a suit pending in said court between A. Magnus Sons Company, a corporation, as plaintiff, and Adam Orey and W. J. Bishop as defendants, on the law docket of said court, final judgment was rendered against the said A. Magnus Sons Company that it take nothing by its complaint therein and in favor of said defendants for the sum of $56.60, and the said A. Magnus Sons Company has obtained a writ of error to reverse said judgment, and a citation directed to the said Adam Orey and W. J. Bishop, defendants in error, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco in the State of California according to law within thirty days from the date of the service of said citation:

Now, the condition of the above obligation is such

that if the said A. Magnus Sons Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

IN WITNESS WHEREOF, A. Magnus Sons Company, a corporation, has caused these presents to be executed by its attorney, Thomas G. Greene, thereunto duly authorized, and the said Surety has caused these presents to be executed by its
thereunto duly authorized, the day and year last above written.

A. MAGNUS SONS COMPANY,
By Thomas G. Greene,
Its Attorney.
FIDELITY & DEPOSIT CO. OF MD.
By Clarence D. Porter,
Its Attorney in Fact.

Corporate seal.

Service of the within bond by receipt of a duly certified copy thereof is accepted at Portland, Oregon, this 7th day of July, 1922.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

And on July 7, 1922, there was issued and filed the following:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

A. Magnus Sons Company,
a corporation,

Plaintiff,

vs.

Adam Orey and W. J. Bishop,

Defendants.

WRIT OF ERROR
(Copy)

UNITED STATES OF AMERICA,)
State and District of Oregon,) ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, to the Honorable Judges of the District Court of the United States for the District of Oregon: GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable CHARLES E. WOLVERTON, one of you, between A. MAGNUS SONS COMPANY, a corporation, plaintiff and plaintiff in error, and ADAM OREY and W. J. BISHOP, defendants and defendants in error, a manifest error hath happened to the damage of A. Magnus Sons Company, plaintiff in error, as by said complaint doth appear; and we, being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States this the 7th day of July, A. D. 1922.

G. H. MARSH,
Clerk of the District Court
of the United States for the
District of Oregon.

(Seal of Court)

I HEREBY CERTIFY that copies of the within Writ of Error were, on the 7th day of July, 1922, lodged in the office of the Clerk of the District Court of the United States for the District of Oregon, for the said defendants in error.

G. H. MARSH,
Clerk of the District Court of
the United States for the Dis-
trict of Oregon.

(Seal of Court)

Due and legal service in Multnomah County, Ore-

gon, of the within Writ of Error upon the above named defendants and each of them is hereby admitted and accepted this 7th day of July, 1922.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

A. MAGNUS SONS COMPANY,
a corporation,
Plaintiff,

vs.

ADAM OREY and W. J. BISHOP,
Defendants.

CITATION ON WRIT OF ERROR (Copy)

United States of America,)
State and District of Oregon)ss.

To Adam Orey and W. J. Bishop, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the State of California, within thirty days from the 7th day of July, 1922, pursuant to a writ of error on file in the office of the Clerk of the District Court of the United States for the District of Oregon, in that certain action wherein A. Magnus Sons Company, a corporation, is plaintiff, and you, Odam Orey and W. J. Bishop, are defendants in error, to show cause, if any there be, why the judgment given, made and entered in favor of

the said Adam Orey and W. J. Bishop, in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Chas. E. Wolverton, United States District Judge for the District of Oregon, this 7th day of July, 1922, and of the independence of the United States the one hundred and forty-fifth.

CHAS. E. WOLVERTON,
District Judge.

Service of the foregoing citation by receipt of duly certified copies thereof is hereby accepted for both of said defendants at Portland, Oregon, this 7th day of July, 1922.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

A. Magnus Sons Company,
a Corporation,
Plaintiff,

vs.

Adam Orey and W. J. Bishop,
Defendants.

AMENDED STIPULATION

In lieu of stipulation heretofore on July 7, 1922, signed and filed herein, it is now hereby stipulated by

and between the parties by their respective attorneys, as follows:

1. That the Transcript of Record on Writ of Error in said cause shall consist of the following:

Complaint

Answer

Motion to Strike Parts of Answer and Demurrer to Answer

Opinion of Court Thereon

Order Allowing Motion and Sustaining Demurrer

Amended Answer

Reply

Order Denying Reformation, Dismissing Affirmative Answer and Remanding Cause to Law Side

Judgment Order

Bill of Exceptions

Petition for Writ of Error

Assignment of Errors

Order Allowing Writ of Error and Fixing Amount of Bond

Bond on Writ of Error.

Writ of Error

Citation

This Stipulation

Clerk's Certificate.

2. That in printing said Transcript of Record the caption, title, clerk's endorsements of filing of papers and other formal matters may be omitted.

3. That said Transcript may be certified by the clerk of said court without comparing the aforesaid documents and papers printed therein with the originals

thereof, such comparisons being hereby waived.

4. That an order may be entered herein, on the application of plaintiff in error, enlarging the time within which to file the record and docket the above entitled cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to and inclusive of the 31st day of August, 1922.

July 14, 1922.

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff in Error.

DEY, HAMPSON & NELSON,
G. L. BULAND,
Attorneys for Defendants in Error.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

A. MAGNUS SONS COMPANY,
a corporation,
Plaintiff,

vs.

ADAM OREY and W. J. BISHOP,
Defendants.

CERIFICATE OF CLERK TO TRANSCRIPT OF RECORD

United States of America)
)ss.
District of Oregon.)

I, G. H. Marsh, Clerk of the above entitled court, hereby certify that the foregoing record consisting of printed pages numbered from 1 to 134 inclusive, presents a full, true and correct copy of the proceedings had and orders entered in the above entitled cause as therein stated, as the same appear of record and on file in my office, and as required in the stipulation of counsel for the parties in lieu of praecipe filed and shown therein; and that the same constitutes the entire record of the proceedings in said cause as the same appear in my office and official custody, except the original Writ of Error and Citation which are attached to and transmitted herewith.

In accordance with stipulation of counsel for the parties, set out in the foregoing Transcript, this record

is certified to by me without comparison of the papers and proceedings printed therein with the originals thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at my office in the City of Portland, State of Oregon, this —— day of August, 1922.

.....

Clerk.

No. 3905

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. MAGNUS SONS COMPANY, a corporation,

Plaintiff in Error,

vs.

ADAM OREY and W. J. BISHOP,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon, Honorable Charles E. Wolverton, District Judge.

BAUER, GREENE & McCURTAIN,

Attorneys for Plaintiff in Error.

FILED

OCT 16 1922

F. D. MONCKTON,

CLERK.

THE IVY PRESS, PORTLAND

Names and Addresses of Counsel Upon This Writ of Error:

THOMAS G. GREENE, 600 Henry Bldg.,
Portland, Ore.,

ALLEN H. McCURTAIN, 600 Henry Bldg.,
Portland, Ore.,
For Plaintiff in Error.

BEN C. DEY, Yeon Bldg., Portland, Ore.,
ALFRED A. HAMPSON, Yeon Bldg.,
Portland, Ore.,

ROSCOE C. NELSON, Yeon Bldg.,
Portland, Ore.,

GEORGE L. BULAND, Yeon Bldg.,
Portland, Ore.,
For Defendants in Error.

No. 3905

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. MAGNUS SONS COMPANY, a corporation,

Plaintiff in Error,

vs.

ADAM OREY and W. J. BISHOP,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon, Honorable Charles E. Wolverton, District Judge.

STATEMENT

(The numbers in parenthesis throughout this brief, unless otherwise stated, refer to pages of the Transcript of Record.)

Plaintiff is a dealer in hops, brewers' machinery and supplies in Chicago, Ill., where its business was estab-

lished in 1867. Defendants are growers of hops in Polk and Marion counties, Oregon. In 1917 they operated five yards under lease, and in January of that year submitted to plaintiff for acceptance contracts for the sale and delivery of hops to be grown by defendants on leased lands in Marion county, Oregon, during 1917, 1918 and 1919. The contracts were prepared by defendant W. J. Bishop using the regular printed forms in common use among hop growers and buyers, the written portions being filled in by him to conform to the quantity, price, description of lands, and other terms offered (63). W. J. Bishop had been in the hop business for nearly twenty years as buyer, seller, grower and commission merchant. Part of the time he represented large buyers and was quite familiar with hop contracts similar to the contract in question in this action. He had filled out many of them and all his experience had been with like grower's contracts (67), so that, when he wrote and forwarded the contracts for plaintiff's acceptance his act was not that of an unsophisticated farmer dealing with unfamiliar things. There was a separate contract for each of the three years named, identical in all respects except the year, but this controversy touches only the contract for the crop of 1919. After the contracts had been prepared by W. J. Bishop as aforesaid they were executed by defendants in duplicate and were mailed to plaintiff at Chicago accompanied by a letter (66). Plaintiff executed the contracts without alteration of a letter or figure and returned them to defendants (83). Plaintiff's duplicates

were recorded. The contract in suit is set out as Exhibit A, annexed to the complaint (6) and is admitted in the second paragraph of the amended answer (25).

It is also admitted that plaintiff in all respects performed all the terms of the contract on its part to be performed, and on March 29, 1919, advanced to defendants $1800, being three cents a pound for expense of cultivating the crop that year, and on September 4, 1919, advanced $3000, being five cents per pound for expense of picking sixty thousand pounds of hops (4, 25).

It was stipulated upon the trial that the total amount of hops grown and picked by defendants on the lands described in the contract in 1919 was 38,429 pounds and that defendants delivered only 28,882 pounds thereof, leaving 9,607 pounds undelivered (40).

The contract price of the hops was 11½ cents per pound but at the request of defendants plaintiff had increased the same to 16 cents (47). The contract fixed the measure of damages in case of default by either party as the difference between the contract price and the market value at Salem, Oregon, on October 31, 1919 (9-10). The undisputed testimony is that the market value at Salem, Oregon, on said date was 85 cents per pound (39).

Plaintiff brought its action for said difference, alleging in substance the making of the contract of January 26, 1917, wherein and whereby defendants sold to plaintiff 60,000 pounds of hops of the crop to be raised and grown by defendants in the year 1919 on the lands therein described, and agreed to deliver the same be-

tween the 1st and 31st of October, 1919; the performance by plaintiff of its covenants; the failure of defendants to deliver all the hops grown by them and the amount of the damage (2-5). Defendants filed an answer in which, after admitting formal matters and the execution of the contract, they denied that they thereby sold 60,000 pounds or any part thereof of the 1919 crop to be raised on said lands in excess of the actual amount of hops they were to receive out of said crop "after the owner of said premises had retained one-fourth of the total amount of hops grown thereon as crop rental for the use of said premises", and admitted delivery of 29,592 pounds, and demand by plaintiff for delivery of the remainder of 40,000 pounds (13-14).

For a first separate defense the answer then alleged in substance that approximately 40,000 pounds of hops were grown on said lands in 1919 by the defendants, "and one Hop Lee, the owner of said lands and lessor of said lands to defendants, the lessees thereof, under a crop rental lease"; that during 1919 defendants leased from Hop Lee the lands described in the contract under a crop rental of one-fourth of the hops grown; that the contract between plaintiff and defendant *"was intended to, and did in fact, provide for the sale and purchase of all the hops of the crop to be raised on the premises described therein during the year 1919 and grown by the defendants"*, but was not intended to, and in fact did not include one-fourth part of the crop of hops grown on said premises belonging to and grown by Hop Lee, the owner of said premises, as tenant in common with de-

fendants of the crop grown by said Hop Lee and defendants jointly; that plaintiff knew of the lease by defendants from Hop Lee whereby the latter was to have one-fourth of the crop as rental and was a joint tenant with the defendants in the production and ownership of the crop; that it is inequitable to permit plaintiff to contend for a construction of the contract requiring defendants to sell and deliver to plaintiff all of the hops produced on said premises; that the agreement between plaintiff and defendant was intended to be and was an agreement on the part of defendants to sell to the plaintiff "as many pounds of hops not in excess of 60,000 pounds as might be grown and harvested by the defendants alone on and from said premises during the year 1919 and including only that part of the hops grown on said premises of which the defendants were the owners and to the delivery of which the defendants were to become entitled after there had been retained by Hop Lee, the owner of said premises, one-fourth part of the total crop produced thereon by him and by the defendants jointly to which one-fourth part said owner was entitled under the terms of his lease"; that *defendants are entitled to a construction of said contracts imposing no obligation to sell or to deliver hops in excess of 29,592* pounds, being the amount grown to which they were entitled to the possession; and that if said contract as written "by reason of the inadvertence and mistake of the parties in reducing the same to writing and thereby failing to set forth in writing their intentions and actual agreements, is not susceptible of the construction herein

contended for, defendants are entitled to a reformation of said contract so that the same will be reformed under decree of this Court so as to impose no obligation on the part of defendants beyond the obligation which they assumed and which it was the intention of the plaintiff and defendants to define and create" (13-17).

A second separate defense alleged, in effect, the existence of a custom and usage in the hop business in Oregon that hop ranches "should be leased upon a crop rental rather than upon a cash rental"; that by reason of the recital in said contract that defendants leased the premises therein described, and of the existence of said custom and usage and knowledge of the parties thereof, it was the intention of the parties to said contract to provide for the sale and delivery to plaintiff of only so many pounds of hops not in excess of 60,000 pounds as might be produced on said premises during 1919 of which defendants were owners; that their share amounted to 29,592 pounds which was delivered to plaintiff and was a full and complete performance of the contract; and that in justice and equity and by reason of said custom and usage and the intention of the parties the contract should be construed accordingly (17-19).

Plaintiff interposed demurrers to both of the separate answers, and a motion to strike those portions relating to the alleged lease, crop-rental, share of the landlord, construction of the contract, and all of paragraphs IV and VI of the first separate defense (20-21).

District Judge Bean granted the motion and sustained the demurrers in a memorandum opinion (22-24)

in which he said *inter alia:* "It is also alleged or stated in the answer that the contract as written and signed, by mistake omitted the condition that defendants should not be required to deliver to plaintiff the landlord's portion of the hops. It is true that in this court the defendant in a law action may set up an equitable defense but the answer does not go far enough to do so. It does not allege what the original contract was or that by mutual mistake the provisions permitting the delivery of hops to the landlord was omitted, and without allegation of that kind the answer would not be sufficient to justify a decree" (23).

Acquiescing in the construction of the contract which their original answer had thus invited, and abandoning every attempted defense save that of reformation, defendants grasped at the straw thus held out to them by Judge Bean's opinion and filed an amended answer (25-31) in which they rested their entire case on the theory that the contract as written by themselves in language and terms of their own choosing, is susceptible of no other meaning than that predicated of it by the complaint, but that it does not express the terms actually agreed upon by the parties and should be reformed on the ground of mutual mistake. Said amended answer admits the execution of the contract and the copy thereof annexed to the complaint as Exhibit A (6-12), and all other material averments of the complaint except that by said contract or otherwise they sold to plaintiff any hops in excess of the actual amount they were to receive as their share of the crop of 1919.

For a separate and affirmative defense the amended answer alleges, in substance, that during 1919, the lands described in the contract were under lease from Hop Lee to them on a crop-rental of one-fourth of the crop of hops grown thereon by them; that prior to the execution of the contract with plaintiff negotiations therefor were carried on at Chicago, Ill., for defendants acting through their agent A. C. Bishop; that said negotiations culminated in the agreement for the purchase by plaintiff from defendants of "60,000 pounds of so much of the hops to be grown in 1919 on the premises described in Exhibit A to plaintiff's complaint, to which the defendants would become entitled by the terms of the lease held by them"; that "by said agreement 60,000 pounds of hops were to be delivered by defendants to plaintiff *if the defendants' share* in the hops grown on said premises should be equal to, or in excess of, that amount, but in case *defendants' share* should amount to less than 60,000 pounds because of a shortage of crop, then defendants should deliver the full amount of *their share* of said crop"; that "by said agreement defendants further agreed to mortgage to plaintiff their *entire share* of said crop to secure advances made by plaintiff to them"; that the further terms of said agreement, not relating to the description of the hops sold, were as expressed in Exhibit A of the complaint (6-12); that thereafter said agreement was reduced to writing and prepared in Oregon where defendants executed it, but "by reason of the mutual mistake and inadvertence of the plaintiff and defendants in reducing said agreement

to writing" the same does not express the true agreement and understanding of the parties "in that the description of the hops sold to plaintiff by defendants as contained in said writing is as follows: *'60,000 pounds of hops of the crop to be raised and grown by the seller in the following year 1919, on the following described real estate'*, and the description contained in said writing of the crop to be mortgaged by defendants is as follows: *'The entire crop of hops to be raised upon the premises above described in the year 1919'*, which descriptions of the hops covered by said contract were, by reason of the mutual mistake and inadvertence of the parties, erroneous, and to make said descriptions conform to the true agreement and understanding of the parties as said agreement is set forth in paragraph III hereof (27), said provisions should be reformed and rewritten by this Court, so that the description of the hops to be sold by defendants to plaintiff should read as follows: *'60,000 pounds of hops* OF THE SELLER'S SHARE *of the crop to be raised and grown in the following year, 1919, on the following described real property'*, and the description of the hops to be mortgaged by defendants to plaintiff should read as follows: 'THE SELLER'S SHARE OF THE *crop to be raised upon the premises above described in the year 1919.'*" The amended answer then alleges that the mutual mistake did not arise on account of the negligence of the defendants; that they did not discover the mistake until plaintiff demanded the hops; and, finally, that due to shortage of crop defendants' share of the hops grown on the premises described in Exhibit

A of the complaint during 1919 was only 29,592 pounds which were delivered to plaintiff in accordance with the alleged true agreement and understanding. A decree to reform the contract accordingly, and for costs was prayed (26-31).

The reply put the equitable defense thus pleaded in issue, and a trial was had on the Equity side of the court (32, 35) at the conclusion of which District Judge Wolverton said:

"The claim for reformation of the contract in the case is based upon a mutual mistake of the parties. I think there is no doubt that the sellers did make a mistake, or at least they were not careful enough in drawing their contract; but the plaintiff made no mistake. There has been no showing that there was a mistake on the part of the purchaser in the formation of this contract. The contract was written here by the sellers, and it was sent back to Chicago, and received there by the buyer, and the buyer signed it. There is no testimony here at all showing that there was any mistake made on the part of the buyer, and, in cases of this kind, the testimony must show by clear evidence that there was a mutual mistake between the parties. In such a case as that, the court will reform the instrument; otherwise, it will not; and I do not think, in this case, that the testimony supports a cause for reformation on the ground of mutual mistake. The equity case will therefore have to be dismissed" (35-36).

An order and decree was accordingly entered dismissing the separate answer and defense and continuing

the cause for further trial as an action at law (38-39).

The answer was not amended, no new pleading was filed, and the decision of Judge Bean on the motion and demurrers (22-24), and of Judge Wolverton on the equitable answer stripped the defendants of every defense save only three denials. Moreover, every possible legal proposition was thereby eliminated from the controversy. Only three issues remained, namely:

1. The averment in paragraph VII of the complaint (4) that defendants raised, grew and harvested 40,000 pounds of hops on said lands in 1919. Denied in paragraph IV of the amended answer (25).

2. Conversion by defendants of 10,748 pounds of said crop, paragraph VIII of the complaint (4). Denied in paragraph V of the amended answer (26).

3. Market value of hops at time for delivery, and amount of consequent damages, paragraph IX of complaint (4). Denied in paragraph VI of amended answer (26).

It is important to note that by the amended answer all pretense that the agreement with plaintiff is other than plain, certain and unambiguous, as Judge Bean said of it (22-23), is discarded. By asserting that they made a mistake in saying one thing when they intended to say another and invoking the equity arm of the court to rewrite their contract for them and correct their mistake, defendants admit that the agreement they did write is plain and certain—so plain and certain that their only relief is in reformation. The amended answer appealing to Equity conceded the hopelessness of

relief at law. No room was left for interpretation or construction. There was nothing to construe. Interpolation, not interpretation; destruction, not construction, was the only hope left; and after a full hearing, including a mass of testimony on custom and usage, hop leases, crop rentals, cash rentals, etc., Judge Wolverton denied the equitable relief sought. Defendants may have made a mistake or at least were not careful enough in drawing their contract, but there was no showing that there was a mistake on the part of the plaintiffs (35).

Therefore when the cause went to trial on the law side of the court before a jury on the issues thus narrowed, it was incumbent upon plaintiff to prove only the three facts above stated. A stipulation in open court covered the first and second, viz: amount of hops grown and amount delivered (40), and the testimony of two witnesses covered the third, viz: market value of hops at Salem, Oregon, October 31, 1919 (39). This, then, was the only issue remaining on which any evidence on the part of defendants was admissible and they offered none thereon. The contract itself had been under fire in two forums but had come out unscathed, and branded as definite, certain and unambiguous. It had just received a clean bill of health from a court of equity, and had never at any time been tainted with any charge of fraud, accident or undue influence.

Defendants, however, were permitted, over plaintiff's objection, to introduce testimony of preliminary negotiations and telegrams prior to the execution of the

written contract, evidence of leasing of the hop yards, terms of the lease, transactions between defendants and their landlord in relation to the crop, opinions of hop buyers and dealers as to the meaning of terms and expressions current in the hop business, production of the yards, and other irrelevant matters. The trial judge justified his admission of this testimony, as he said: "Not for the purpose of proving what the contract is, but for the purpose of informing the court and jury as to the condition and situation of the parties prior to entering into this contract, and to show the circumstances which led up to the contract, and *all for the purpose of enabling the court to interpret the contract in the light of the conditions and circumstances that existed at the time the contract was entered into*" (57). In substance, this ground was restated in the concluding opinion wherein the court undertook to construe the contract (94-97) and held that defendants had obligated themselves to sell and deliver *only their share* of the hops to be grown by them on the lands described in the contract, and that *"it is presumed that a leasing of land for the production of hops on the shares would result in the lessees having a three-fourths interest in the crop and the lessor a one-fourth interest"* (96).

Both sides requested the court to direct a verdict (98); but plaintiff's application was accompanied by a request to submit the case to the jury upon a controverted question of fact arising from the conflict between the testimony of August Magnus for plaintiff and A. C. Bishop for defendants (99). Plaintiff's requests

were refused and the court took the case from the jury by directing a verdict for the defendant.

From the judgment entered on the verdict so returned this writ is prosecuted.

SPECIFICATIONS OF ERROR

For brevity and convenience in discussion the thirty-two assignments of error (102-123) may be grouped under the following specifications:

1. Error in admitting testimony of the conversations, negotiations and telegrams of the parties preceding the execution of the written contract, and meaning of words and phrases used in said telegrams.

Exception No. 1 (41), Assignment 1, (103).
Exception No. 10 (56), Assignment No. 10 (108).
Exception No. 11 (57), Assignment 11 (108).
Exception No. 13 (59), Assignment 13 (110).
Exception No. 14 (60), Assignment 14 (111).
Exception No. 15 (60), Assignment 15 (111).
Exception No. 16 (60), Assignment 16 (111).
Exception No. 17 (61), Assignment 17 (112).
Exception No. 18 (62,) Assignment 18 (113).
Exception No. 19 (62), Assignment 19 (113).
Exception No. 20 (68), Assignment 20 (114).
Exception No. 21 (69), Assignment 21 (115).
Exception No. 22 (70), Assignment 22 (115).
Exception No. 23 (70), Assignment 23 (116).
Exception No. 24 (71), Assignment 24 (116).
Exception No. 25 (71), Assignment 25 (117).

Exception No. 26 (72), Assignment 26 (117).

Exception No. 27 (77), Assignment 27 (118).

Exception No. 28 (78), Assignment 28 (118).

2. Error in admitting testimony relating to defendants' leases, the terms thereof, the productive capacity of the leased lands and transactions between defendant and their landlord in respect thereto.

Exception No. 2 (49), Assignment No. 2 (103).

Exception No. 3 (49), Assignment No. 3 (104).

Exception No. 4 (50), Assignment No. 4 (105).

Exception No. 5 (50), Assignment No. 5 (105).

Exception No. 6 (51), Assignment No. 6 (105).

Exception No. 7 (51), Assignment No. 7 (106).

Exception No. 8 (52), Assignment No. 8 (106).

Exception No. 9 (56), Assignment No. 9 (107).

Exception No. 12 (59), Assignment No. 12 (109).

3. Error in refusing to direct a verdict for the plaintiff and in directing a verdict for the defendants.

Exception No. 30 (98), Assignment 30 (119).

Exception No. 32 (100), Assignment 32 (122).

4. Error in refusing to submit to the jury the question as to whether plaintiff had been informed prior to the execution of the contract, by A. C. Bishop, a witness for defendants, of the terms and conditions of the lease of the lands upon which the hops were to be grown.

Exception No. 31 (99), Assignment 30 (120).

ARGUMENT

The Pleadings

If the contract sued upon in this case is not uncertain or ambiguous in its terms it must follow that the trial court erred in admitting any testimony of conversations and negotiations of the parties prior to and at the time of its execution for the purpose of "enabling the court to interpret the contract in the light of the conditions and circumstances that existed at the time the contract was entered into," or, indeed for any purpose. For three reasons: *First,* the rule of the "law of the case foreclosed all such matters; *second,* nothing in the pleadings justified such admission; and *third*, it was the court's duty to declare the meaning of a plain, certain and unambiguous contract without the aid of extrinsic evidence.

In the statement of this case we have stressed the fact that the pruning which was administered to the original answer by the decision and order of Judge Bean on the motion and demurrers, and the decree of Judge Wolverton dismissing the affirmative defense in the amended answer, deprived defendants of every defense founded upon alleged mistake or uncertainty in the contract, and of the situation of the parties at the time of its execution. The case was thereby cleared of rubbish and all defenses, save only denials of three facts alleged in the complaint, in the consideration of which neither the execution nor the interpretation of the contract was involved in the slightest degree.

This condition of the record was called to the court's attention early in the trial and in response to an application by defendants to amend their answer to meet the situation, the court said: "If you amended your answer, it would have to be amended in such a way as to meet the objection that Judge Bean has ruled upon in this case, because that becomes the law of the case now. I could not permit you to amend so as to set up the same matter that he has stricken out." (44-46.)

Now, the matter so referred to as no longer available to the defendants, comprises those portions of the original answer printed in italics in the Transcript at pages 13 to 17 thereof inclusive, and the whole of the first and second separate defenses therein at pages 14 to 19 inclusive. The matters thus eliminated from the case, and which defendants were thus, under the doctrine of the "law of the case," precluded from pleading are the identical matters upon which defendants offered proof and the evidence was admitted over plaintiff's objection. This evidence related to defendant's lease of the land on which the hops were grown, the terms of the lease, the landlord's interest in the crop, the intention of the defendants to contract to sell no more than their interest in the crop and to reserve one-fourth thereof for the landlord as crop rental, the construction of the contract accordingly, and a usage and custom to that effect. The court sustained an objection to evidence of custom and usage (47) but admitted testimony of every other matter.

If, as was ruled by the trial judge, those matters could

not again be incorporated in defendant's pleadings as matter of defense, by what legal legerdemain can testimony concerning them be justified? If Judge Bean's ruling (22-24) to the effect that they were immaterial and irrelevant, and constituted no defense to the complaint, became the law of the case so as to bar their further appearance in defendants' pleading, why does it not also bar evidence relating to them? In order to make that ruling Judge Bean necessarily had to find that the contract pleaded in the complaint was definite, certain and free from ambiguities,—in short, that no extraneous facts nor ascriptions of meaning to the written agreement were needed to disclose its plain intent. Unless he had so determined the motion and demurrers must have been denied and overruled. In reaching his conclusion he necessarily made a critical examination of the contract and assumed the truth of all facts well pleaded in the answer, which, of course, were admitted by the demurrers. The demurrers, however, did not admit the truth of conclusions pleaded in the answer, nor the ascription of a meaning to the contract not justified by its plain terms. (*Dillon* v. *Bernard,* 21 Wall. 437; *Gould* v. *Evansville R. R. Co.,* 91 U. S. 534; *Burling* v. *Newlands,* 112 Cal. 476, 44 Pac. 810; *O'Hara* v. *Parker,* 27 Or. 156, 166). If his ruling became the law of the case as to the immateriality of those extraneous facts as matter of defense in pleading, it also became the law of the case as to the interpretation of the contract against the enforcement of which evidence of those extrinsic matters was offered as a defense.

Notwithstanding the refusal of the trial judge to permit defendants to set up any of the matters of defense previously stricken out by another judge, he remarked at the conclusion of the trial: "I will say, as a premise, that the decision of Judge Bean, which was rendered upon motion to strike the complaint (sic), was upon the face of the contract as it was then produced, and his attention was not called to the facts and circumstances and conditions prevailing at the time the contract was entered into. Construing the contract as it appeared to him upon the face of it, he said that it was plain in its terms, and that the construction would follow from the language; but, as I have remarked, he was not in possession of the facts and circumstances and conditions prevailing at the time the contract was entered into. I have those facts and circumstances before me, and in that respect the conditions are different. I am passing upon a different situation from that which he passed upon at that time, and hence I say that his decision does not become the law of the case in so far as I have to deal with it now." (94-95.)

This fairly indicates the view of the trial judge which led to the rulings complained of, and comment thereon will set forth the position and contention of the plaintiff in this review. In the first place, Judge Bean's attention was not called to anything else than the contract set up in the complaint and the allegations of the original answer concerning the transaction, because in argument on demurrers and motions reputable counsel do not travel out of the record. Even had counsel been so

disposed there was no temptation to do so, because the answer attacked by the demurrers and motion alleged in great detail the very "facts, circumstances and conditions prevailing at the time the contract was entered into," referred to in Judge Wolverton's utterance above quoted. The same contract was under critical examination by both judges, and both judges were "in possession of those facts and circumstances and conditions,"—Judge Bean examined them in the form of averments in the original answer, Judge Wolverton considered them in the form of statements of witnesses. The former held that they did not belong in the case because the contract itself was explicit; the latter, although, in effect, conceding the first decision to be correct, held that said facts, circumstances and conditions presented a different situation and therefore the decision of the former did not become the law of the case. Judge Wolverton in the instant case did indeed pass on a "different situation," but the difference consisted only in two elements less than Judge Bean considered, namely, the plea of custom and usage, and right of reformation on the ground of mistake. Both of these were eliminated; the first by a ruling in the trial of the law action (47), and the second by Judge Wolverton's decision and decree in the Equity trial (34-39). It is difficult therefore to reconcile the concluding opinion of the trial judge (88-97) with his ruling that Judge Bean's decision on the motion and demurrers became the law of the case (46). It is impossible to reconcile it with what appears to be the settled doctrine in the Ninth Federal Circuit.

"The Law of the Case"

Whether the application of the doctrine of the "Law of the Case" be given the force and effect of res judicata, or whether it be considered only as a rule of judicial propriety and comity to avoid unseemly conflicts, it is one of very general observance and undeniably promotes the orderly and speedy administration of justice.

"It is a principle of general jurisprudence," said Sanborn, *Circuit Judge,* in *Shreeve* v. *Cheesman,* 16 C. C. A. 413; 69 Fed. 785, 790, "that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. The principle is nowhere more firmly established or more implicitly followed than in the circuit courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every federal circuit court in the Union, until it is reversed or modified by an appellate court." In *Meeker* v. *Lehigh Valley R. Co.,* 175 Fed. 320, it is held that where a demurrer to a complaint is sustained on the merits by one district judge, the ruling is conclusive on a subsequent demurrer filed to the complaint with immaterial amendments, heard before another judge of the same court of judge of the same court of concurrent jurisdiction. In *Hunter* v. *Ruff,* 47 So. Car. 525, 58 Am. S. R. 907, it is held that an order made by a circuit judge deciding that a party is not a party to a proceeding before him, if not appealed from, is absolutely binding upon any

succeeding circuit judge, whether right or wrong, and it is beyond the power of the latter to review or reverse such order. Similar views appear to be held in *Cromwell* v. *Simons,* 280 Fed. 663, 674 (C. C. A., 2d Circuit.)

Nowhere has the rule been more emphatically endorsed or received higher recognition as a standard of judicial conduct than in this circuit. In *Cole Silver Mining Co.* v. *Virginia & Gold Hill Water Co.,* 1 Saw. 685, 6 Fed. Cas. No. 2990, *Circuit Judge* Sawyer had granted a preliminary injunction (1 Saw. 470, 6 Fed. Cas. No. 2989), and subsequently a motion on bill and answer for its dissolution came on for hearing before *Mr. Justice Field* sitting in the Ninth Circuit. The learned justice said:

"The injunction, although preventive in form, is undoubtedly mandatory in fact. It was intended to be so by the circuit judge who granted it, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The circuit judge possesses, as already stated, equal authority with myself in the circuit, and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case."

This was reaffirmed by the same judge in *Giant Powder Co.* v. *Cal. Vigorit Powder Co.,* 5 Fed. 197, 202, where it is observed that "this consideration to the different judges composing the court is essential to the harmonious administration of justice therein." The case in 1 Sawyer was cited and followed by *Circuit Judge*

Pardee in *Oglesby* v. *Attrill,* 14 Fed. 214, 215, who said: "Solicitor for defendant also moves the court that the substituted service of process heretofore made in this case be set aside and annulled. I have examined the record, and I find that this question has been passed upon and adjudicated by the district judge sitting in this court in the early stage of this case, 12 Fed. 227. This decision is not open to review to any other judge sitting in this court in the same case."

Wakelee v. *Davis,* 44 Fed. 532, is peculiarly apposite by reason of the similarity of the facts with the situation presented by the record in the instant case. On final hearing, as here, where the propositions of law presented were the same as on demurrer previously decided by another judge, *Judge* Coxe said (p. 533):

"Some testimony has been taken *pro* and *con,* but, upon all important questions, it is substantially conceded that the legal aspects of the cause remain unchanged. It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the judge who presided; it is the law of this court, to be followed, upon similar facts, until a different rule is laid down by the supreme court. A re-examination and discussion of the question involved is, therefore unnecessary, for the reason that the court is constrained to follow its former decision."

The same judge in the later case of *Hadden* v. *Natchaug Silk Co.,* 84 Fed. 80, said:

"It is, of course, my duty to follow the decisions of this court and of the circuit court of appeals even though a different opinion may be entertained upon some of

the propositions involved. Different judges do not make different courts. When the circuit court has spoken through any of its judges its decision should be, and generally is, regarded as controlling upon all the others. This is the spirit of American Jurisprudence. We sacrifice much to precedent. A proposition once decided between the same parties on similar facts must stand decided. It is of little moment that the decision was made by another than the sitting judge. If entitled to any consideration this circumstance gives the decision even greater weight. A judge may change his own mind; he cannot change the mind of another. Manifestly then, the first inquiry is, what has already been decided, and what, if anything, is left open for decision?"

Applying this test to the instant case it must be obvious that the facts attempted to be alleged in the original answer which, by the decision on demurrer and motion, were held to constitute no defense, are the same as those which the trial judge permitted to be proved and to control his interpretation of a contract which the first decision held was plain, certain and unambiguous and must be interpreted without those facts. No application was made for a rehearing on Judge Bean's decision and no appeal was taken therefrom, but under the terms of the order and in harmony with a suggestion in the decision, an amended answer was filed in which the matters that had been held irrelevant and immaterial were omitted. This brings the case in principle squarely within the doctrine announced by this court in *Presidio Mining Co.* v. *Overton,* 261 Fed. 933, where it is said (p. 939): "The motion to dismiss the bill was granted

unless the plaintiff within 20 days filed an amended bill stating a case for granting equitable relief. No application was made for a rehearing, and no appeal was taken from the decision. *The insufficiency of the original complaint thereupon became res judicata in the subsequent proceedings before Judge Van Fleet.*" (Italics ours.)

Nor would the application of the rule to the case at bar be repugnant to anything in *Circuit Judge* Gilbert's dissenting opinion in the same case as reported in 270 Fed. at page 407. It is there said: "If Judge Dooling had entered a final judgment dismissing the suit, which he did not, *the judgment would of course have been res judicata as to a second or concurrent suit on the same grounds as were disclosed in the original complaint,* but not if the judgment was for the omission of an essential averment which was supplied in the second suit." In principle the instant case comes clearly within the exception noted.

The original answer alleged matter contradictory to the terms of the contract in suit and sought a construction thereof in contravention of its plain language. This was coupled with a defective statement of the equitable defense of reformation grounded on mistake. The decision on the motion and demurrer eliminated all the new matter alleged except the mistake and held in effect that the latter by appropriate averments could be set up by an amended answer. (22-24.) This decision manifestly found that the contract is invulnerable to further attack on any ground other than mutual mistake, and necessarily was a dismissal of the answer as

to every other defense. On all points except reformation for mutual mistake it was a final judgment and therefore res judicata as to a second answer alleging the same grounds. And of course if further answer on the forbidden grounds was barred evidence tending to prove those grounds was also barred and should have been excluded by the trial court under the doctrine of law of the case.

The case comes within the narrowest limits of the rule, whose harshest application, that of maintaining a former decision although erroneous, is sometimes refused; but only when the former decision is manifestly erroneous, or the facts misunderstood, or a principle overlooked, or where the ruling sought to be reviewed was not necessary to the first opinion (18 Standard Enc. Proc. 804). Defendants are estopped from contending that Judge Bean's decision is erroneous because they neither applied for a rehearing nor stood upon their pleading, but answered over and after jettisoning their miscellaneous cargo of Hop Lee, crop-leases, and excuses, sailed into the only port the decision left open for them. Nor can it be said the facts were misunderstood because the decision turned on the contract itself viewed in the light of what defendants said about it in their original answer, which was at least as prolix and discursive as what their witnesses subsequently said; nor that a principle was overlooked because consideration of the questions raised required no more than knowledge of legal propositions so elementary that the veriest tyro would yawn at the reading of them; nor that the ruling

was not necessary because it went directly to the points raised by the motion and demurrers. Neither can the extent to which it went any further be questioned by defendants, because it suggested to them a method of properly pleading the only defensive matter which the decision itself left open to them. They filed an amended answer accordingly (24-31) in which they first allege that they held the lands described in the agreement under a lease from Hop Lee reserving one-fourth of the crop of hops as rental, and that prior to the execution of the writing negotiations were had between defendants, acting through their agent, A. C. Bishop, and plaintiff at Chicago, Ill., for the contracting of defendants' share in the 1919 crop to be raised. Two mistakes are alleged to have been made in reducing the contract to writing. The clauses as written: "*60000 pounds of hops of the crop to be raised and grown by the seller in the following year, 1919, on the following described real estate*" (Trans. 6), and "*the entire crop of hops to be raised upon the premises above described in the year 1919* (10), should have read respectively: "60000 pounds of hops *of the sellers' share* of the crop to be raised and grown in the following year 1919, on the following described real property" and "the *sellers' share* of the crop of hops to be raised upon the premises above described in the year 1919" (28). In all other respects the contract is admitted to be correct and free from mistake.

The issue on this defense was tried before Judge Wolverton sitting on the Equity side of the court and defendants were permitted not only to introduce evi-

dence relating to the negotiations prior to the execution of the contract and the terms of the lease, crop-rental, etc., but were permitted to introduce testimony tending to prove a custom and usage in the hop business in Oregon of growing hops on leased land whereby the landlord receives a part of the crop as rental. It was shown by the witnesses on this point, however, that lessees of lands for hop growing purposes sometimes paid cash rental, and that where crop rentals were paid they varied from one-third of the crop to one-fifth of the crop; in short that there was no uniform custom or usage on the subject but the matter rested in contract in each particular case. The evidence in the Equity case covered a wider range than that admitted by the same judge in the law action. Nevertheless, in the former a decree was entered dismissing the further and separate answer and defense (26-31, 38-39) on a decision holding in substance that the testimony did not support a cause for reformation on the ground of mistake (35-36).

THE EVIDENCE

Involved in the disregard of the issues of the pleadings, and doctrines of the law of the case, are the errors classed under the first specification above stated in admitting evidence objected to. The rule that evidence must conform to the pleadings, and be relevant and material to some fact in issue is a judicial platitude, yet it was violated twenty-eight times in the trial of this case. That the relevancy and materiality of testimony

are to be measured by the issue formed by the pleadings requires no citation of authorities here.

As has been stated, the trial opened with only three controverted issues under the pleadings. They were: Defendants raised 40,000 pounds of hops in 1919; they refused to deliver 10,000 pounds thereof; the market value of the 10,000 pounds was 85 cents per pound. The first two facts were admitted by defendants at the commencement of the trial so that the only issues remaining was the market value of hops at Salem, Oregon, on October 31, 1919. Now, what possible relevancy or materiality to that issue were the "facts and circumstances and conditions prevailing at the time the contract was entered into' (January, 1917), which the learned trial judge said that he and the jury were entitled to know? What light was shed on the market value of hops at Salem in October, 1919, by the conversations between W. J. Bishop and Albert Magnus or August Magnus in Oregon or Chicago, on the subject of the hop industry generally, at different times prior to 1917 (42, 103)? In what possible way and to what extent were the questions: "Do you know who had the lease of those lands in 1916"? (49) or "What were the terms of that lease with respect to the rent to be paid to the owner, Hop Lee" (50) relevant to the fact of market value? This inquiry might be prolonged to include all of the questions objected to comprising every exception save one down to No. 29. The errors are too obvious for argument. Mere inspection amounts to a demonstration. The incompetency of the evidence was so palpable that

after counsel for plaintiffs had once stated their position and the grounds of their objection, they avoided encumbering the record by interposing only general objections. This was sufficient; for, as was said in *State v. Bartlett,* 170 Mo. 658; 59 L. R. A. 756, 761; where evidence is no evidence at all such a "sheet lightning" objection is sufficient.

In *Prouty Lumber & Box Co. v. Cogan,* 101 Or. 382, 200 Pac. 905, on a state of facts quite analogous to those of the instant case, the court, by *Burnett, C. J.,* said:

"The relevancy and materiality of testimony are measured by the issue formed by the pleadings. In the instant case the defendants denied the complaint and made no other defense. Their offer to prove was entirely foreign to the issues thus formed. It was as if the pleadings had said: 'It is true, we owe the plaintiff $3,406.20 for the rived logs in question. However, we sold those logs to the Warren-Scott Company, which in turn by the consent of ourselves and the plaintiff agreed to pay the amount to the plaintiff, and we are to be discharged.' In other words, under the general issue the defendants were attempting to prove a novation, a proposition clearly outside the pale of pleadings or evidence, a clear variance.

There are authorities to the effect that the court of its own motion may prevent the introduction of improper evidence. Again, it is said that, a reason for the rule against general objections is that it is unfair to the trial court to make a general objection without particular specification of the grounds of the objection. But in good reason, if the trial judge is possessed of sufficient legal acumen to recognize the validity of the

legal conclusion suggested by the general objection, he is at liberty to decide the point and exclude the evidence offered. If for his own information the adverse party requires a more specific objection, he should move for the necessary specifications. He cannot rightly speculate on the decision of the court and then complain that the objection is too general. It is quite as much his duty to be fair to the court as it is that of the other party. Moreover, if he would prevail on appeal, he must put his finger on the error complained of. If the court is informed of the vice of the testimony offered, it is not necessary for the objecting party to put into his objection a brief on the subject, or to go into tautological detail."

In the instant case, paraphrasing the foregoing excerpt, defendants admitted the contract but denied the amount of damage. Their proof of negotiations leading to the contract, the lease, crop-rental, etc., was entirely foreign to the issue thus formed. It was as if the pleadings had said: "It is true we made the contract set up in the complaint, that we raised 40,000 pounds of hops on the land described, and that we have delivered only three-fourths thereof. However, we had agreed to deliver the other one-fourth of the crop to our landlord, and we are therefore discharged from liability to plaintiff."

The Oregon code contains two provisions on this subject which are but declaratory of what is and long has been the law everywhere:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can

be, between the parties and their representatives or successors in interest no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties."

O. L. Sec. 713.

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

O. L. Sec. 717.

As fully appears by the record, the alleged mistake or imperfection in the contract in question was put in issue and decided adversely to the defendants in the equity trial; the validity of the contract is not questioned; it was held by Judge Bean to be free from the only ambiguity ever imputed to it, and at no time has it been questioned for illegality or fraud. Consequently, there was no occasion for the trial judge to be placed in the position of the parties to the agreement. Only the first paragraph of section 713 above quoted applied;

and the court was not called upon to exercise any function with respect to the exceptions stated in said section. As stated by the Supreme Court of Oregon in *Allen* v. *Hendrick,* 206 Pac. 736, citing previous Oregon decisions bearing on Sections 713 and 717, *supra:* "Where the language of a writing is clear and unambiguous, extrinsic evidence is not admissible upon the ground of aiding the construction." Or, as stated in Clark on Contracts, p. 591, quoted with approval in *Cottrell* v. *Smokeless Fuel Co.,* 78 C. C. A. 366, 148 Fed. 594, 9 L. R. A. N. S. 1187: "The courts will not make an agreement for the parties, but will ascertain what they have agreed by what they have said and by the meaning of the words used to express their intention. Where the intention clearly appears from the words used, there is no need to go further, for in such cases the words must govern; or as is sometimes said, where there is no doubt, there is no room for construction." It is only when an instrument is uncertain, indefinite or phrased in ambiguous language that evidence of the circumstances under which it was made, situation of the parties and preliminary negotiations is admissible. Such facts are never admissible to create an uncertainty where none exists. The vice of the trial court's rulings lies just here. He took an agreement which his colleague on the bench had decided is certain, definite and free from ambiguity (with which conclusion, as based on the writing itself, he apparently agreed), and by receiving a mass of irrelevant testimony an uncertainty was created which otherwise did not exist. Then out of

that factitious dubiety there was evolved, under the guise of interpretation, a new contract for the parties. This was effected by excision and interpolation resulting in the identical changes which defendants had prayed for in their equitable defense for reformation, and which, while sitting as chancellor on the Equity side of the court, he had denied. Many defendants, if permitted to say what they choose and talk as long as they like could raise such a fog of words as to form a cloud of uncertainty around almost any instrument calling for the payment of money which they do not want to pay. It is a new way for a sophisticated person to pay old debts. It is unfortunate for defendants to have to pay 85 cents a pound for hops which they themselves had agreed to deliver for 16 cents a pound; but depreciation of hardship is no justification for relaxation, much less total disregard, of the fundamental rule designed to meet just such situations. The defendants chose their own language when they wrote this agreement; they had made many such contracts, and were dealing with a familiar subject; they must be presumed to have known the force and effect of the language in which they chose to embody their offer and contract; if they made a mistake it was entirely their own and the same judge had so held; plaintiff said nothing and did nothing but sign on the dotted line. In enforcing the contract in accordance with its plain intent the court was relieved from the responsibility, often attendant upon such cases, of determining whether the opposing party is guilty of misrepresentation or trickery. There is no such element

in this case. It was for the trial court, in the first instance, to hew to the line, leaving defendants to suffer the consequence of their own carelessness or mistake, for which their own writing provides the terms and measure.

It would be supererogatory to cite authorities to this court on this point, but a few concrete applications of the rule to similar situations may be excused.

In *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 272, 42 L. Ed. 1033, 1036, it is said:

"It is true that in cases of ambiguity in contracts, as well as in statutes, courts will lean toward the presumed intention of the parties or the legislature, and will so construe such contract or statute as to effectuate such intention; but where the language is clear and explicit there is no call for construction, and this principle does not apply. Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed. A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."

Suppose A. C. Bishop did tell plaintiff, January 15, 1917, that the hops were to be grown on lands under a lease reserving one-fourth of the crop to the lessor as

rental? He did not make the contract; he merely wired his principles to take up the business with plaintiff direct (69, 72). Then, ten days later, when plaintiff received the contract prepared by defendants themselves in which they undertook to sell and deliver the entire crop and said nothing about excepting the landlord's share, had not plaintiff the right to rely on the words being used in their ordinary sense and to assume that defendants had either made a different lease or had protected themselves by some arrangement with their landlord? To hold otherwise effectuates the result of artfully misleading plaintiff by enabling defendants to contract with it on the supposition that their words meant one thing while the court adopts a construction by which they mean another thing more to defendants' advantage.

In determining the legal import of the provisions of a contract according to their own terms, the Supreme Court in another case, recalled "certain well settled rules in this branch of the law", in these words: "One is that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances can equity interpose." The opinion further quotes with approval from a decision by *Mr. Justice Harlan* in *Kihlberg* v. *U. S.*, 97 U. S. 398, 24 L. Ed.

1106: "The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

U. S. v. *Gleason,* 175 U. S. 588, 602; 44 L. Ed. 284, 289.

After discussing the cases involving this principle, the Supreme Court, in *Dermott* v. *Jones,* 2 Wall. 1, 17 L. Ed. 762, 764, says:

"The principle which controlled the decision of the cases referred to, rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provisions for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

The court below appeared to be impressed with the situation of the defendants in having obligated themselves to deliver one-fourth of their crop to their landlord, and intimated that in consequence they could not be presumed to have sold their entire crop (44). They could *contract* to sell what they did not own. The Uniform Sales Act, now a part of the law of Oregon, and which is merely a crystallized declaration of what has been the law everywhere for time out of mind, provides:

"The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired

by the seller after the making of the contract to sell, in this act called 'future goods.'

There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen."

O. L. Sec. 8169.

And there is an implied warranty in every contract to sell that the seller will have a right to sell the goods at the time when the property is to pass. Said the Circuit Court of Appeals in *Godkin v. Monahan,* 27 C. C. A. 410, 83 Fed. 116, 120:

"It is also well settled with respect to the interpretation of contracts that an engagement to perform an act involves an undertaking to secure the means necessary to the accomplishment of the object, and that whatever is necessary to the performance of the undertaking is part and parcel of the contract, and, although not specified in the contract, is to be implied and is in judgment of law contained in it." (Citing cases.)

A large portion of the commercial transactions of the country is comprised of just such contracts. Defendants incurred their obligation to their landlord before they wrote the agreement with plaintiff (52-57) yet made no protective provision in the latter. There was no room for a presumption as to what defendants would do because the court had their own account of what they actually did. And they had a right, as we have seen, to contract to sell and deliver the entire crop to be raised on the leased land. True, they assumed the risk of being unable to deliver one-fourth of it in case they should not be successful in acquiring the land-

lord's share; but that risk is precisely what every one assumes who contracts to deliver products and finds out afterwards that he cannot obtain the goods. Defendants could have guarded themselves from such consequences by a stipulation in the agreement with plaintiff, or by a contract with the landlord to buy his fourth of the hops; failing to do either they will have to pay damages. An excerpt from the opinion in *Osborn v. Nicholson,* 13 Wall. 654, 20 L. Ed. 689, 694, is appropos:

"It was formerly held that there could be no warranty against a future event. It is now well settled that the law is otherwise. Benj. Sales 463. The buyer might have guarded against his loss by a guaranty against the event which has caused it. We are asked, in effect, to interpolate such a stipulation and to enforce it, as if such were the agreement of the parties. This we have no power to do. Our duty is not to make contracts for the parties, but to administer them as we find them. Parties must take the consequences, both of what is stipulated and of what is admitted. We can neither detract from one nor supply the other. *Dermott v. Jones,* 2 Wall. 1; *Revel v. Hussey,* 2 Ball. & B. 287."

And in *Chicago M. & St. P. R. Co. v. Hoyt,* 149 U. S. 1, 37 L. Ed. 625, 630, it is said: "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract."

In *Coker v. Richey* (Or.), 204 Pac. 945, there was under consideration a contract for the sale of "all the pianos, piano players," etc., and the court said:

"Reduced to its lowest terms the effort of the defendant is to construct a contract entirely different in its terms and obligations from that expressed in the writing which both parties admit they signed. * * * It may be remarked that while the contract calls for a sale of 'all the pianos, piano players,' etc., the effort of the answer is to contradict the plain statement of 'all the pianos,' and to interpose exceptions to that language. For instance the answer says, in so-called explanation of the consideration: 'That said plaintiff would receive and pay to defendant in cash the actual inventory cost, with freight charges on all pianos and other musical goods then ordered and not yet received by defendant *that defendant should desire or ask plaintiff* to receive' * * * All of this outlines the position of the defendant in his answer to be not all of the goods were sold, but only such as he himself should desire to sell. If such efforts are to be countenanced, it would be child's play to reduce a contract to writing, and would operate as a virtual repeal of section 713 O. L."

In the case at bar the position is not even outlined in the answer, but sprang mushroom-like during the trial.

INSTRUCTIONS

The third and fourth specifications of error, comprising exceptions and assignments numbered 30, 31 and 32 (98-100, 119-122) challenge the refusal of the court to direct a verdict for the plaintiff, and, upon denial of a motion therefor, his refusal to submit the

cause to the jury upon a question of fact.

It may be contended that since each party requested a peremptory instruction for a verdict, and the court granted the request of defendants, both parties are estopped from claiming that any question should have been submitted to the jury; that all disputed questions of fact are determined in favor of the defendants and that the only questions open for review are, was there any substantial, legal evidence in support of the court's finding, and was there any error in the direction or application of the law?

Plaintiff could safely rest on the showing hereinabove made that there was no substantial, legal evidence in support of the court's finding; that all of the evidence objected to and admitted was utterly foreign to the issue and incompetent for any purpose, and that there was error in the application of the law from the beginning to the end of the trial. As *Chief Justice* McBride said in *State* v. *Rader,* 62 Or. 37, 124 Pac. 195: "No good finding of fact can be predicated on illegal evidence."

But plaintiff is not required to waive any advantage to which it may be entitled by reason of the theory upon which defendants tried the case, and which the court sanctioned by his rulings all through the trial. That theory appears to be that if plaintiff knew, before or at the time of the execution of the contract, the terms of the lease of the lands on which defendants were to grow the hops and that thereby defendants were obligated to deliver one-fourth of the 1919 crop to their

landlord, defendants would be bound to deliver only three-fourths of said crop to plaintiff notwithstanding the definite and certain provisions of the contract to the contrary.

Had plaintiff done nothing more than request a directed verdict in its favor, the court's finding on the question of fact thus suggested would be conclusive, provided there was no error in admitting the evidence (*Beuttell* v. *Magone,* 157 U. S. 154, 39 L. Ed. 654; *U. S.* v. *Bishop,* 60 C. C. A. 123, 125 Fed. 181). But plaintiff did something more and is therefore not within the rule of those cases.

In *Empire State Cattle Co.* v. *Atchison T. & S. F. Ry. Co.,* 77 C. C. A., 601, 147 Fed. 457, both parties requested a directed verdict, and plaintiff in addition asked that other instructions directed to particular features of the case be given to the jury. The trial judge denied the requests and directed a verdict for the defendant. On review it was contended that by submitting the requests for special instructions plaintiff showed its purpose not so to invoke the action of the court that it would thereafter be precluded from going to the jury. After pointing out that there was some warrant for the contention in some of the cases, the court held (Sanborn, *Circuit Judge* dissenting), that where both parties invoke the action of the trial court by requests for a directed verdict, and the request of one of them is accompanied or followed by requests for other instructions to the jury, such other requests do not, by themselves, amount to a withdrawal of the one for a directed verdict.

On certiorari, the Supreme Court (same case, 210 U. S. 1, 52 L. Ed. 931, 15 Ann. Cas. 70), held that where both parties request a peremptory instruction *and do nothing more,* they thereby assume the facts to be undisputed, and, in effect, submit to the trial judge the determination of the inferences proper to be drawn from them. "But nothing in that ruling," said the court, speaking by *Mr. Justice* White, "sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist, by appropriate requests, upon the submission of the case to the jury where the evidence is conflicting, or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of *Beuttell* v. *Magone* by causing it to embrace a case, not within the ruling in that case made." The court then cites, as upholding the view thus stated and as pointing out the distinction between the case before it and the case under consideration in *Beuttell* v. *Magone*. the opinion of *Circuit Judge* Severens in *Minahan* v. *Grand Trunk Western R. Co.,* 70 C. C. A. 463, 138 Fed. 37, 41, and quotes with approval from the concurring opinion of *Circuit Judge* Shelby in *McCormack* v. *National City Bank,* 73 C. C. A. 350, 142 Fed. 132, where, in referring to the *Beuttell* v. *Magone* case he said:

"A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted facts, which, if proved to the satisfaction of the jury, entitles him to a verdict regardless of the evidence on which he relies in the first place. It cannot be that

the practice would not permit him to ask for peremptory instructions, and if the court refuses, to then ask for instructions submitting the other question to the jury."

The court then held (210 U. S., pp. 9-10) that "the action of the trial court in giving the peremptory instructions to return a verdict for the railway company (defendant) cannot be sustained merely because of the request made by both parties for a peremptory instruction, in view of the special requests asked on behalf of the plaintiff. The correctness, therefore, of the action of the court in giving the peremptory instruction depends not upon the mere requests which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the court to set aside the verdicts if the cases had been given to the jury and verdicts returned in favor of the plaintiff."

The rule was approved and followed by this court in *Southern Pac. Co.* v. *U. S.* 137 C. C. A. 584, 222 Fed. 46, and is the settled practice elsewhere.

Farmers & Mer. Bank v. Maines, 105 C. C. A. 329, 183 F. 37.

Pensacola State Bank v. Mer. & Farm. Bank, 180 F. 504.

In re Iron Clad Mfg. Co., 116 C. C. A. 642, 197 F. 280.

Breakwater Co. v. Donovan, 134 C. C. A. 148, 218 F. 340.

Charlotte Nat. Bank v. Southern Ry. Co., 103 C. C. A. 261, 179 F. 769.

Chesapeake & O. R. Co. v. McKell, 126 C. C. A. 336, 209 F. 514.

A. C. Bishop, a brother of one of the defendants, testified that he stated to plaintiff's officers in Chicago, between January 10th and 15th, 1917, that his brother's hop yards were leased on crop-rentals of one-fourth, and that he wired his brother that plaintiffs were interested in contract hops (69-71). It was after receipt of this telegram that defendants effected the lease with Hop Lee and prepared the contract for plaintiff's acceptance (48, 52, 56-57). In his final decision the court assumed that A. C. Bishop telegraphed the information of Magnus' knowledge of the amount of the landlord's interest in the crop to Bishop Bros. (92-93); but the testimony does not support the assumption. A. C. Bishop says: *"I immediately wired my brother telling him that they* (Magnusses) *were interested in some term contracts"* (70); and again: *"I wired him I was leaving for home that evening, and that Magnusses were interested in term contracts and to take it up direct."* (72.) W. J. Bishop says: "My brother wired me in January, 1917, that Magnus was interested in three year, or term contracts, and to take it up direct; he was coming home" (48). The testimony of August Magnus, president of plaintiff corporation, was taken by deposition long before the trial. He testified in substance that at the time

plaintiff executed the contract in suit he knew that the land on which the hops were to be grown by defendants was leased, but knew nothing of the terms and conditions of the lease, nor whether it was for crop rent or cash rent, nor the amount thereof; and that there was no mention of sellers' share, or three-quarters of the crop (84-85). In referring to the cross-examination of this witness (87), the court remarked in the presence of the jury: "Magnus himself has contradicted himself in the testimony he has given here. I mention one particular only. He testified in his examination in chief that he knew that the crop was to be produced from leased land; but on cross-examination he testified as follows:

'Q. His land was leased? A. So far as whether his farms were leased is concerned, we knew nothing of it, or as to the terms of the lease.' So that there is a very plain contradiction in his own testimony" (92).

With all due respect, this is, we submit, disingenuous and not fair to the witness. His testimony as a whole does not justify the interpretation which the court, usurping the functions of the jury, assumed to place upon it. It seems fairly obvious that the witness, having stated on his direct examination that he knew the lands were leased—indeed, the contract itself so recites—meant, and by reasonable intendment, in view of his positive statement on direct examination, said, in his answer above quoted, that plaintiffs, although knowing that the lands were leased, knew nothing of the *terms* of the lease—know nothing of the *details* of it. His answer

was an abbreviated restatement of what he had said on direct examination and at least is in sufficient harmony therewith to render the court's strictures unmerited.

At all events, here was a conflict in the testimony between the most important witnesses on each side. If there was any merit in the court's view that plaintiff's knowledge of the terms of the lease, and especially of the provision for one-fourth crop rental, operated to limit defendants' obligation under the contract sued on to three-fourths of the crop instead of all of it, then the conversation between A. C. Bishop and August Magnus at Chicago becomes the crucial point in the case. It is nowhere claimed that plaintiff was put on notice otherwise than by what A. C. Bishop said, and the latter somewhat weakened his evidence on cross-examination, for he there says: "I did not mention 60,000 or 80,000 or 40,000 or any other number of pounds, I just asked him (Magnus) if he was interested in some term hops. That is all I said about that specific thing or these particular yards. I didn't mention any yards in particular. I mentioned the yards that Orey and Bishop were running, without specifying any number of pounds from any particular yards, either separately or in the aggregate. After we got finished talking I told him that the ones I represented leased the yards. He asked me how we leased the yards. I told him we paid crop rents. *I think* he asked me how much and I told him one-quarter. Nothing was said about getting the hops belonging to the owner of the land" (73).

In this state of the record the court further said:

"It is well known to the plaintiff in this case, as well as the defendants, that defendants were lessees of the lands upon which this crop was to be grown, *and it is presumed that the buyer knew that a leasing of land for the production of hops on the shares would result in the lessees having a three-fourths interest in the crop and the lessor a one-fourth interest*" (96). The first clause of this statement is correct, but why fall back upon a presumption involving a non-sequitur to establish a result which had already been foreclosed when the court found that A. C. Bishop told the truth, as against plaintiff's denial that the buyer knew any such thing? (92). Is this a presumption of law or of fact? Can it be said *as a matter of law* that all hop leases are made on crop rentals on the basis of three-fourths to the grower and one-fourth to the landlord? Where has it ever been so held? If it is a presumption of fact, then its utterance by the court is out of place because it was for the jury to say from the evidence whether such fact existed, and there was no evidence offered in this trial on that subject.

On the only possible theory upon which an instructed verdict for the defendant in this case can be predicated the court necessarily had to find *as a question of fact on conflicting evidence* that plaintiff knew the terms of that lease when the contract was signed. Such finding necessarily involved a *weighing of testimony and a consideration of the credibility of witnesses*—a witness for the plaintiff against a witness for the defendant; because there was no other testimony on the point and the presumption was against the fact because it was absent from

the written agreement. Suppose the case had been left to the jury under the special instruction requested by plaintiff, and the jury had found that plaintiff did not know the terms of the lease? This would have meant that they believed Magnus and did not believe Bishop. Could the court have set aside that verdict because he had formed a different opinion of the witnesses and had preferred to believe one and not the other?

These are matters outside of the province of the judge in the trial of an action at law to a jury. On the question of fact thus passed on by the court the evidence cannot be said to be meagre on either side. It was for the jury to pass upon the alleged contradiction in the testimony of a witness and to weigh the evidence pro and con. The direction of a verdict in such circumstances is a plain invasion of the rights of a litigant secured by the VII amendment of the Federal constitution. In all trials the jury are the exclusive judges of the credibility of the witnesses and the weight of their testimony, and must be left to the free exercise of their functions. Whether the evidence be weak or strong, it is their right to pass upon it; and it is not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law (*Hickman v. Jones,* 9 Wall. 197, 19 L. Ed. 557, 563; *Aetna Life Ins. Co. v. Ward,* 140 U. S. 76; 35 L. Ed. 371; *Coulter v. Thompson Lumber Co.,* 74 C. C. A. 38, 142 Fed. 708).

Not the least remarkable feature of the court's final

remarks at the trial of this case, and its ruling upon the special request tendered by the plaintiff (100), is the statement that the conflicting testimony on a question of fact is a "question for the court, because it is offered solely for the purpose of aiding the court in interpreting the contract." In its final analysis, this can only mean: "This contract is ambiguous and requires interpretation; I cannot interpret it without the testimony of A. C. Bishop on a question of fact; to accept the testimony of A. C. Bishop I must first find that the conflicting testimony of plaintiff's witness is untrustworthy; having judged of the credibility of the two witnesses and weighed their testimony, I decide the disputed fact in favor of defendants and therefore am able to interpret the contract and say that its meaning is other than its language imports." In short, sitting as a court of equity the same judge had decided two days previously that the contract could not be reformed; that defendants could not be permitted to interpolate into the instrument which they themselves had written, *"the sellers' share* of the crop to be raised"; yet the same judge presiding at the trial in an action at law on the contract thus denied reformation, reformed the contract under the pretense of interpretation by interpolation of the identical provision which, as an equity judge, he had denied. Thus was accomplished the reformation of a written contract on the ground of a *unilateral mistake, in a law action tried to a jury, without an issue in the pleading for that purpose, the court passing on the credibility of the witnesses and the weight of the testimony!* Defendants took

themselves into a court of equity where they rested their affirmative defense solely on the ground that they and plaintiff had made a mistake in not having the written contract say, "their share, or three-fourths of the crop," instead of all of it. That court held the plaintiff made no mistake, and dismissed the answer. Then on the law side, before the same judge, with no amendment to the pleading which equity had emasculated of all of its virility, defendants were permitted to offer evidence that plaintiff, although having made no mistake in executing the contract, knew in January, 1917, that defendants' lease called for the delivery in 1919 of one-fourth of the crop. Plaintiff's witness denied any such knowledge, but the court accepted defendants' version and decided "all the parties being advised of the situation under which this lease was made, then it would be perfectly reasonable and natural to read this contract as that the sellers had sold 60,000 pounds of the crop to be raised and grown by them; that is to say, of their share in the crop to be produced; and I think that is a reasonable construction of the contract" (96). In partial support of this conclusion the court found that in normal years the yards in question had a productive capacity of 80,000 pounds, whereas, the testimony of defendants themselves was to the effect that only once in five years had the yards produced that quantity (half of which was guessed at as only 40,000 pounds were picked that year), and the average annual production for five years previous to the trial was 40,000 to 60,000 pounds a year (65, 76, 77).

Thus defendants, without asking for it in their pleading, were freely granted at law the relief which they had asked for in equity but had been denied. The case is *sui generis.* We find only two reported decisions in which the situation is at all analogous.

In *Pitcairn v. Philip Hiss Co.,* 61 C. C. A. 657, 125 Fed 110, 114, where the lower court had defeated an attempt to accomplish a somewhat similar result, it was held that, according to the modern view, the rule which prohibits the modification of a written contract by parole is a rule of substantive law, and not of evidence, and the appellate court further remarked: "The court simply held that the writings were to be taken as constituting the agreement, and that extraneous evidence could not be resorted to, to modify it. No error was committed in so applying the familiar rule. *Whatever be the case in other jurisdictions, in a federal court a written contract cannot be reformed on the trial of an action at law, and disguise it as we may, that is what the attempt to make effective the evidence in question plainly amounted to.*"

In *Prudential Casualty Co. v. Miller,* 168 C. C. A. 458; 257 Fed. 418, it appears another attempt to enlarge the jurisdiction of a federal court in a law action had been more successful in the lower court. There, as here, the question was whether one of the parties had been informed of certain facts prior to entering into a written contract, but there, *not* as here, the question had been left to the jury. On review the appellate court said:

"We need not determine whether the insurance com-

pany, prior to the issuance of the rider, was misinformed by Allen as to the extent of the alarm system installed, or as to whether he undertook to waive the nonconnection of the safe with such system, or as to whether the minds of the parties in interest ever met as to the purpose to protect and the actual protection of the safe. If Allen and Miller, or his agent, so misunderstood each other that their minds never met as regards the extent of the store's equipment, or if Allen through mistake or designedly misinformed the insurance company as to its extent, or if he undertook to waive the failure to connect the safe with a burglar alarm system, and thus exceeded his power, a situation was presented which a court of law could not correct. Correction, if desired, must be obtained in a court of equity, after which the actually existing contract between the parties as thus determined can be enforced. If the insured can prove that he made a different contract from that expressed in the writing, he can, on making sufficient proof, have it reformed in equity; but he cannot accept his policy without reading it, and in an action at law upon the instrument ignore one of its provisions and have it enforced otherwise than according to its terms. *A jury may not thus reform a policy by striking out one of its clauses.*"

What has been said in the discussion herein under the topics, Pleadings, Law of the Case and Evidence is applicable to the error assigned to the refusal of the court to direct a verdict for the plaintiff, and in directing verdict for the defendants. Without the evidence referred to in the first and second specifications of error there remains nothing but admitted facts and one fact

not disputed by any testimony to the contrary. The evidence on the part of the defendants admitted over plaintiff's objections, was, as has been sufficiently shown, no evidence at all. Where there is no competent evidence tending to support a verdict for the defendant, and where plaintiff's case is clearly made out and the only defense attempted to be proved is not pleaded, a direction in favor of the plaintiff must follow (26 R. C. L. 1073).

The judgment below should be reversed for error of law; and as there is no dispute about the facts entitling plaintiff to recover, a judgment should be rendered in this court instead of remanding the cause for a new trial (*Fellman v. Royal Ins. Co.*, 106 C. C. A. 557, 184 Fed. 577, 581; *Walker v. Gulf & I. Ry. Co.*, 269 Fed. 885, 891 (C. C. A.); Simkin's Fed. Suit at Law, p. 223). If the contentions of plaintiff herein are sound there would remain nothing to retry.

Respectfully submitted,

BAUER, GREENE & McCURTAIN,
For Plaintiff in Error.

No. 3905

United States Circuit Court of Appeals

For the Ninth Circuit

A. MAGNUS SONS COMPANY,
a corporation,

Plaintiff in Error,

vs.

ADAM OREY and W. J. BISHOP,

Defendants in Error.

Brief for the Defendants in Error

Upon writ of Error to the District Court of the United States for the District of Oregon,
Honorable Charles E. Wolverton,
District Judge.

DEY, HAMPSON & NELSON,
GEORGE L. BULAND,
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STATEMENT.

(The numbers in parenthesis throughout this brief, unless otherwise stated, refer to pages of the Transcript of Record).

This is an action at law to recover damages for an alleged breach of contract involving the interpretation of a grower's contract for the sale of hops, and a determination of the question as to whether the defendants, the sellers in this contract, have performed their obligations thereunder.

A grower's contract is one which has a technical meaning in the hop business. It is a contract which provides for the sale of an estimated quantity of hops to be grown on a specified piece of ground, but under which the grower and seller is obliged to deliver that quantity only actually produced from the land specified in the contract. In this respect it is different from a dealer's contract, which provides for the sale of a definite quantity of hops, irrespective of the person by whom or the place on which such hops are produced. (59, 60, 61, 77, 78, 79.)

The contract in question provided for the sale of "sixty thousand (60,000) pounds of hops of the crop to be raised and grown by the seller in the following year 1919, on * * * forty-five acres of land * * * known as the Hop Lee Ranch." In the contract it was stated "the seller represents to the buyers, that they lease the above described property." The contract price of the hops was eleven and one-half cents per pound (later increased by agreement on the part of the plaintiff to sixteen cents). At the time of the alleged breach the market price of hops was eighty-five cents a pound, and plaintiff now seeks a judgment for alleged damages in the sum of $6628.83, being the difference between the contract price of sixteen cents per pound and the market price of eighty-five cents per pound, of 9,607 pounds of hops, to the delivery of which it contends it was entitled.

There is no dispute about the fact that 38,429 pounds of hops constituted the crop grown on the premises described in the contract during the year 1919, and that

of this crop defendants delivered to the plaintiff 28,882 pounds only, and to Hop Lee, the landlord of the defendants, 9,607 pounds, his share of the crop under the leases providing for a crop rental to Hop Lee, from which leases the defendants derived their right to operate the yards.

The questions before this court are not the narrow technical ones suggested by the plaintiff, but the broad one as to whether the contract contained any obligation on the part of the defendants which they failed to perform.

In order that this question may be answered correctly in this court, as it was answered correctly in the lower court, it seems necessary to amplify to some extent the statement of the case set forth in the brief of plaintiff in error.

In December of 1916, A. C. Bishop, a brother of one of the defendants, employed as a salesman, (68) made a trip East for the purpose, among others, of arranging contracts for the sale of hops to be grown on yards of the defendants, W. J. Bishop and Adam Orey (69). These yards were known as the Chung and Stevens yards (48) and at the time the contract in question was executed, were owned by a Chinaman, Hop Lee (48). Orey and Bishop had a written lease on the Chung yard covering the period from 1915 to 1919 (49-50) and, before executing the contract with the plaintiff, and in order to be sure of the continued right to operate the Stevens yard, changed the then existing oral lease on

that yard into a written lease (52 and defendants' Exhibit 1, (52-56, inc.). This lease provides for the delivery to the lessor, Hop Lee, of "one-fourth of all hops produced from said real premises each year during the life of this lease" (55), and the lease on the Chung yard also provided that "Hop Lee was to get one-fourth of the hop crop and we (the defendants) were to get three-fourths of the crop each year." (50)

While in Chicago, A. C. Bishop saw "three of the Magnusses" (69) and "asked them if they were interested in contracts." (70) At that time he told them (the Magnusses) that his brother's yards were leased (70-71). He also told them (the Magnusses) that "we didn't own any of the yards that I was trying to sell; that we had them all on crop rentals" of one-quarter of the crop. (71) After this conversation A. C. Bishop communicated to his brother the fact that the plaintiff was interested in term contracts and instructed his brother, W. J. Bishop, to handle the matter direct. (72)

It is not disputed that Hop Lee owned the yards mentioned in the contract; that he leased them to the defendants during the contract period; that the rental reserved to him in the leases was one-quarter of the crop; that Hop Lee in fact received his one-fourth of the crop, which he sold to others and that he never sold any hops to the defendants. (74)

As a result of the information communicated to him by A. C. Bishop from Chicago, that the plaintiff was interested in purchasing hops under contract, W. J. Bishop sent the following telegram to the plaintiff:

"McMinneville Org 23 Stamped

1917 Jan 24 AM 1 15

A. Magnus and Sons
Randolph Chicago Ill

We offer you sixty thousand pounds three years at eleven half FOB our own leased yard written on regular growers contract mentioning primes yard we wish to sell heavy producer always spray and usually produces prime to choice quality was contracted Hugo Lewi last year Rosenwald year before. Wire direct

Bishop Bros." (58)

To this telegram the plaintiff sent the following answer:

"Chicago, Ill, January 24, 1917.

Bishop Bros.
McMinneville, Oregon.

We accept your contract on sixty thousand pounds prime Oregons for three years at eleven and a half cents fob conditions as mentioned in your telegram of January twenty-third. Forward contracts promptly. Will send shipping instructions for last purchase this week sure. Awaiting reply from one customer to whom we have submitted sample.

A. Magnus Sons Company." (62)

In due course and after defendants had negotiated the written lease with Hop Lee on the Stevens yard (the lease is dated January 24, 1917 (52) and the contract is dated January 26, 1917 (6) W. J. Bishop forwarded the contracts in duplicate to the plaintiff, accompanied by the following letter:

> "Inclosed find contracts for 3 years for 60,000 lbs. on the Chinaman's yards we are running. Kindly sign duplicates and forward back to us. You can use your own judgment about recording them, if you want you can save that expense. We have sold both to Rosenwald and Hugo Lewi several years and they saved the expense. Contracting is active. Wolk Hop Co. took 40 thousand from Geo. Yergen at 11½ and have offered this and 12 to several growers. Other dealers are offering 11 all for one year.
>
> Bishop Bros." (66)

There was a crop shortage in 1919, due to the fact that hops were left on the vines in 1918, which ruined the yards. (65) The three-fourths of the crop delivered to the plaintiff, being materially less than the estimated quantity it had expected to receive, and the skyrocketing of price making it to its interest to demand delivery of the hops produced and owned not only by the defendants but also by the defendants' landlord, Hop Lee, it is now urging a construction of the contract which will entitle it to damages because of the refusal of the defendants to deliver to it at sixteen cents per pound 9,607 pounds of hops, which, in order to get, they would have had to buy

in the open market at eighty-five cents per pound. (123)

The original answer was attacked by certain motions to strike, and by demurrers to certain affirmative pleas. These matters were heard by District Judge Bean. It is only fair to say that if his opinion is accepted literally it shows a different view, on his part, of the contract under consideration than that entertained by District Judge Wolverton. Plaintiff in error makes the point that Judge Bean held the contracts to be definite, certain and unambiguous, and that therefore there existed no necessity for the court to ascertain the facts and circumstances which surrounded the parties at the time they entered into this contract in order to ascertain the true meaning thereof. Upon the trial of the case on its merits, however, Judge Wolverton entertained a different view. That his view was not essentially different from that of Judge Bean and that the inconsistency in their attitude is apparent rather than real, is indicated by the observation of Judge Wolverton when objection was interposed by the plaintiff in error to evidence being received which would tend to disclose the facts and circumstances surrounding the execution of the contract. We allude to his remarks (43) as follows:

> "I have read that opinion of Judge Bean's and gone into it pretty thoroughly, and I might say, further, I have consulted with Judge Bean about it, and I am of the opinion that that decision does not decide the exact question that is now before us."

Irrespective, however, of any question as to whether the views of Judge Bean and Judge Wolverton, with

respect to the proper interpretation of this contract, were the same or were in opposition, the fact remains that after Judge Bean had stricken from the answer of the defendants those parts of their pleadings which he deemed immaterial, an issue still remained as to the proper interpretation to be placed upon the contract by virtue of that part of paragraph II of the answer which remained after the motion to strike had been allowed.

The paragraph is as follows:

> "Admit that the defendants executed the contract annexed to the complaint and marked Exhibit "A" but deny that defendants sold to plaintiff thereby or otherwise 60,000 pounds of hops of the crop to be raised and grown by defendants in the year 1919 on the lands described in said contract, or any part of 60,000 pounds of said crop of hops in excess of the actual amount of hops that the defendants were to receive out of the crop grown on said lands." (13)

This denial placed squarely before the trial court the issue and the only issue that ever existed or that now exists on the law side of this court, namely, the question as to the true interpretation to be placed upon the contract with respect to whether the contract obligated the defendants to deliver all of the hops grown on the premises described therein or the hops grown thereon, less the share required to be paid by them to their landlord, Hop Lee, for crop rental.

The views of Judge Bean were such, however, that the defendants deemed it advisable, without abandoning

their contention as to the true interpretation of the contract, which they have maintained at all times on both the law and the equity sides of the court, to seek a reformation of the contract in equity so that the uncertainty existing because of its ambiguous provisions could be rendered certain, and the intent of the parties to provide for the sale of only the hops grown and owned by the defendants, placed beyond controversy. An appropriate plea for reformation of the contract on the ground of mistake was interposed by the defendants and a trial had upon the equity side of the court. At the conclusion of this trial reformation was denied by Judge Wolverton upon the sole ground that any mistake shown to have existed was a mistake upon the part of the defendants only. But *non constat* because there was no mutuality in mistake, the contract is unambiguous, as plaintiff in error contends. Because, in the opinion of Judge Wolverton, the contract, as written, is ambiguous and required extrinsic aids for its proper interpretation, the case was continued for further trial as an action at law and the judgment entered therein from which this appeal has been taken. That the judgment in favor of defendants so entered was proper will be developed by the argument hereinafter set forth.

ARGUMENT.

Defendants in error will first discuss the only points of law presented by plaintiff in error in this case, and attempt to show that they in no way control its proper determination, and thereafter suggest to the court the true legal principle by which the learned trial court was

guided in its determination, and which it is believed this court will follow in reviewing the judgment here on appeal. To the complaint of plaintiff there was attached, as an exhibit, the contract which forms the subject matter of this controversy. This contract therefore became an essential part of plaintiff's case, which it was the duty of the court to construe for the guidance of the jury in the event it became necessary to submit to the jury for determination any issue of fact. The contract so before the court was not the contract of which the plaintiff attempted to state the legal effect in paragraph IV of its complaint, but the contract as written by the parties, as said contract was attached to the complaint as Exhibit "A". Had the defendants, therefore, admitted every material fact pleaded by plaintiff in its complaint, it would still have been the duty of the court to construe the contract and determine therefrom, in view of the established facts, whether the plaintiffs had performed or failed to perform their obligations. Plaintiff in error contends, at page 11 of its brief, that only three issues remained for trial, first, as to the quantity of hops grown, second, as to the conversion of part thereof by the defendants, and third, as to the market value of hops at the time of delivery. It points out, at page 12, that a stipulation was entered into covering the quantity of hops grown and the amount delivered, and that the testimony with respect to the market value was undisputed. Under this analysis of the pleadings it concludes, to its own satisfaction, that there was no issue before the court to be tried, and there remained only for the court to direct a verdict in its favor.

Its analysis of the pleadings, however, is defective in that it ignores the fact that a contract was before the court, that it was the duty of the court to construe such contract, and therefrom to determine whether, conceding the other facts to be beyond controversy, the defendants had performed or failed to perform their obligations to the plaintiff. Introduction of testimony to enable the court, in the fulfillment of the duty imposed upon it, to construe the contract, was not error therefore under the rule of the "law of the case," as will be hereinafter pointed out, nor because there was nothing in the pleadings justifying such admission, since the contract was in the pleadings, and not only justified but necessitated the admission of the testimony which the court in fact received. Nor was the admission of such testimony precluded by the third reason mentioned on page 16 of the brief of the plaintiff in error, namely, that it is the duty of the court to declare the meaning of a plain, certain and unambiguous contract without the aid of extrinsic evidence. It is the duty of the court to declare the meaning of *every* contract and of the jury to be bound by the determination of the court as to the meaning thereof. This contract, as will be hereinafter developed, was not plain and certain but was ambiguous, and to assist in determining the ambiguity thereof, the court heard and was guided by the testimony, of the introduction of which plaintiff in error complains.

The next section of the brief of plaintiff in error is devoted to a consideration of the principle of "the law of the case." Under this it urges that District Judge Bean had construed the contract in accordance with the con-

struction placed thereon by the plaintiff, that Judge Wolverton was precluded from any further examination of the matter, and therefore, as we understand the brief, that this case must be reversed and a judgment entered in favor of the plaintiff, not because Judge Wolverton was necessarily wrong but because his views were inconsistent with those of Judge Bean, and Judge Bean's views were expressed first in point of time.

We concede it to be "a principle of general jurisprudence", as pointed out by Judge Sanborn in Shreeve vs. Cheesman, 69 Fed. 785, cited on page 21 of the brief of plaintiff in error, "that courts of concurrent or coordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action." But we call the attention of counsel for the plaintiff in error to the observation of the same learned judge set forth on page 792 of that opinion, to the effect that "the object of the trial of lawsuits is to reach just decisions, and to thereby preserve and protect the rights of litigants." The principle of "the law of the case" is *always* a rule of practice and *may be* a rule of property. In the case at bar it could have no possible significance except as a rule of practice. Were it necessary, and were it the fact, it could be conceded that Judge Bean had laid down a rule of practice from which Judge Wolverton found it necessary to depart, but that concession would not relieve this court from the duty of determining the case upon its merits, irrespective of any technical rule of procedure. Morrow, Circuit Judge, at page 939 of the opinion in the case of Presidio Mining Co. vs. Over-

ton, 261 Fed., cited by the plaintiff in error at page 24 of its brief, not only made the statement, which is quoted and emphasized by their own italics by counsel for plaintiff, at page 25 of their brief, but he added the further observation, pertinent to the matter before this court:

> "The questions involved in this appeal will, however, be determined upon their merits, as they appear in the whole case, and not upon any technical rule of procedure. But we may properly inquire how far the insufficiency of the original complaint has been overcome by amendments, supplemental allegations and proof. By this method we shall come to a clear understanding of the present controversy and how it has developed from the original complaint."

It is to be noted that this Circuit Court of Appeals does not consider itself bound by a matter res judicata in the lower court as between different judges thereof, or by the rule of practice or procedure denominated generally "the law of the case." It considers such matters for the purpose of reaching just decisions "upon their *merits* as they appear in the whole case." It does not consider itself foreclosed by the chronology of a determination of an issue made in the lower court and discusses the decisions therein made only for the purpose of reaching a clear understanding of the final issue to be determined.

The so-called "law of the case" therefore, upon which plaintiff in error places so much reliance, is of no im-

portance in this controversy if it be established that the contract here under examination was ambiguous and required parol testimony to enable the court to determine the intent of the parties thereto.

Proceeding to a discussion of the evidence, we concede it to be a judicial platitude, as mentioned at page 28 of the brief of plaintiff in error, that evidence must conform to the pleadings and be relevant and material to some fact in issue. It has already been pointed out that this contract was before the court, and plaintiff in error concedes (by necessary implication) by the statement set forth at page 16 of its brief, that the trial court did not err in admitting testimony of conversations and negotiations of the parties prior to and at the time of the execution of the contract, for the purpose of "enabling the court to interpret the contract in the light of the conditions and circumstances that existed at the time the contract was entered into," if the contract sued upon in this case is uncertain or ambiguous. The authorities cited and the argument advanced with respect to the alleged errors on account of the introduction of evidence are based upon the assumption made by plaintiff in error in its own favor of the only issue in the case tried in the lower court, or here required to be tried on the appeal. We concede that if the contract is unambiguous the lower court erred, but we fail to find in the brief of plaintiff in error any suggestion that this contract is without ambiguity, save only the bald statement or assumption in which it indulges to that effect and the implicit reliance it imposes upon the decision of Judge Bean on questions of preliminary pleading.

The third principle of law relied on by plaintiff in error is that stated in the case of Empire State Cattle Co. vs. A. T. & S. F. Ry. Co., 210 U. S. 1, wherein the rule is laid down that the trial court cannot be sustained in a peremptory instruction to return a verdict for one party merely because both parties requested a peremptory instruction, if one of the parties coupled such requested instruction with a further request for a submission of the case to the jury upon an issue created by a conflict in the evidence and under circumstances where the court would not be justified in setting aside the verdict of a jury because of lack of substantial dispute in the evidence. This is the only principle of law urged by the plaintiff in error in this case, which has any possible bearing upon the decision of this court. The fact that it is suggested at all by plaintiff in error shows its own lack of confidence in the other principles relied on and in the construction of the contract urged by it, for if its construction of the contract is sound (a matter about which it has little to say) it would have been as much error for the learned trial judge to submit the suggested, or any question of fact, to the jury for determination as it is contended to be error for it to have directed a verdict for the defendants and to have refused to direct a verdict for the plaintiff.

The issue of fact, because of the non-submission of which to the jury the plaintiff in error finds itself aggrieved, is as to whether "A. Magnus Sons Company did not know that Bishop and Orey were contracting with reference to hops to be raised and produced on leased land," and also as to whether A. Magnus Sons

Company "did not know the terms and conditions of that lease." The first of these questions, defined by the requested instruction (Exception No. 31) (99) is absurd, for the contract itself expressly recited that "the seller represents to the buyers, that they lease the above described property," and there was never any contradiction of the fact that the defendants did lease the premises, and that this fact was known to the plaintiff.

The second point, as to whether the plaintiff knew the terms and conditions of the lease, i. e. that the defendants were required to pay one-quarter of the crop as rental to their landlord, is more nearly debatable, but in view of the wise rule that prevails in the Federal Court as to the power and duty of the judge in controlling the action of the jury in determining an issue of fact, and in view of the undisputed facts in this case, by which either court or jury would necessarily be bound, we believe that Judge Wolverton was correct in refusing to submit the case to the jury under the requested instruction, although he may perhaps have inadvertently erred in the reason assigned for his refusal, set forth at page 100 of the transcript.

It will be noted that A. C. Bishop testified that when he was in Chicago he "saw three of the Magnusses". (69) "I went in there with the intention of selling *them* some spot hops—I think I did; and also asked *them* if *they* were interested in contracts, which *they* were, at the present time. By 'them' I mean the Magnusses." (70) In answer to the question as to whether there was any conversation in regard to the ownership of the yards,

the witness testified: "Yes, sir. I told *them* the yards were leased." (71) In answer to a question from the court as to whether the witness told *them* the terms, he answered: "Yes, sir." (71) The following examination then took place:

Q (By Mr. Hampson) What were the terms as you told them?

A I told *them* specifically that we didn't own any of the yards that I was trying to sell; that we had them all on crop rentals.

Q For how much rent?

A One-quarter rental.

In what way was this testimony disputed so as to necessitate or justify a submission of any issue of fact to the jury? Plaintiff in error relies solely upon the testimony of August Magnus. It is true, as pointed out by plaintiff in error, at page 45 of its brief (although this fact does not appear from the bill of exceptions) that his deposition was taken long before the trial. It is equally true (although this fact does not appear from the bill of exceptions) that the order for the taking of the testimony of August Magnus provided for the taking of the testimony of Albert Magnus, and the testimony of Albert Magnus was never taken. It provided for taking the testimony of G. G. Schumacher, and the testimony of the said Schumacher was taken, and he later appeared in person and was offered by plaintiff in error as a witness in its behalf in the trial of this case,

and while the testimony of August Magnus was taken "long before the trial" it was taken with respect to the specific issue, as to the intent of the parties in regard to the hops to be covered by the contract, raised by the pleadings on the equity side of the court, in which the defendants sought, and needlessly sought, reformation.

How did August Magnus, if at all, contradict A. C. Bishop? On direct examination, referring to A. C. Bishop, he testified "*We* had a conversation with him on the subject of hops generally, but not in reference to the subject matter of the contract." (83-84) Later, in answer to the question, "At the time this contract, which has been received in evidence, was executed, did you have any knowledge as to whether the defendants owned this land or whether the land specified in the contract was leased land?"

A It was leased land. (84)

Q Did you know anything about the terms and conditions of that lease?

A No.

Q Did you have any knowledge that the lease provided that the defendants were to have as their share three-quarters of the output of hops, and that the landlord was to have one-quarter as his share?

A No. (85)

But on cross examination, in answer to the question

"His land was leased?" the witness testified: "So far as whether his farms were leased is concerned, we knew nothing of it, or as to the terms of the lease."

As the learned trial judge clearly pointed out, there was very plain contradiction by the witness in his own testimony and this is more conspicuous in view of the fact that the witness, A. C. Bishop, testified that his conversation was with *three* of the Magnusses, that August Magnus gave the only testimony offered by the plaintiff in error on this branch of the case, that plaintiff in error, although it conceived it to be necessary to take the testimony of Albert Magnus, for reasons known alone to it, did not offer him as a witness, that it produced in person the witness Schumacher (whose testimony, abstracted at pages 80 to 93 of the transcript is not germane to any issue in this case) and failed to produce any one of the three Magnusses with whom the witness A. C. Bishop negotiated this contract, and who were peculiarly fitted to testify with respect thereto.

In view of these circumstances we contend that there was no issue of fact that the court was required to or even justified in submitting to a jury for its determination, and that had the court, by inadvertence, submitted the case to the jury under the instruction tendered by the plaintiff in error, and had the jury returned a verdict for the plaintiff in error, upon the state of the record having been brought to the attention of the trial court, it would have become his duty to set that verdict aside.

But should this Appellate Court arrive at a contrary conclusion and hold that the trial court erred in deciding

this question, rather than in submitting it for decision to the jury, it must necessarily remand the case for a new trial with directions to the trial court to submit such question of fact for decision to a jury under appropriate instructions. The illogical consequences of its own argument plaintiff in error apparently fails to perceive, obvious as they are. In one part of its brief it says the lower court erred and this cause should be reversed because that court determined an issue of fact which should have been submitted to the jury, and at the conclusion of its brief it asks this court to render a judgment in favor of the plaintiff in error without remanding the cause for a new trial. In other words, it asks this court, to do, only in a different way, that which it says it was error for the trial court to do, namely, decide as a matter of law that which is essentially a question of fact.

Having disposed of the fictitious issues and the inapplicable principles of law with which the plaintiff in error has attempted to create confusion and distract attention from the real issue in this case, the defendants in error now submit to the court for consideration the principle and undisputed facts by which it is believed the court will be guided in its determination of this controversy.

The defendants in error in this case do not dispute the principle that parol testimony is inadmissable to vary or contradict the plain meaning and effect of a written contract. A recognition of the existence of this principle, however, is not a concession that it has any application to the case at bar. It is equally elementary that when the meaning of a contract is doubtful or ambiguous, that ex-

trinsic proof is admissible to ascertain the intent of the parties. The contract under consideration is ambiguous. If there was a real inconsistency between the view of this contract adopted by Judge Bean and the view entertained by Judge Wolverton, instead of an apparent inconsistency only, then it is our view that Judge Bean was wrong and Judge Wolverton right, but we hold that the inconsistency was apparent and not real, and this is a view which was taken by Judge Wolverton, who, after discussion of this case with Judge Bean, announced that his rulings did not depart from the requirements laid down by Judge Bean at the time of announcing his decision on certain of the preliminary pleadings.

Be that as it may, the purpose of the trial of a lawsuit is to accomplish justice and in arriving at that result this court will not be embarrassed by any inconsistency in the views of this case that may have been entertained by the learned trial judges who had different aspects of the matter before them for consideration, whether such inconsistencies be apparent only or real.

If the contract is ambiguous Judge Wolverton did not err in admitting the oral testimony which he heard for the purpose, and only for the purpose, of ascertaining the facts and circumstances which surrounded the parties at the time they entered in this contract, in order that he might properly interpret the contract and determine the true intent thereof. If the contract is precise and certain and has the meaning to which the plaintiff in error ascribes to it, Judge Wolverton did err in receiving

the parol testimony, and the assignments of error on this aspect of the case are well taken.

It is worthy of note, however, that in the brief the plaintiff in error presents to this court, the only principles of law relied on by it are those which the defendant in error concedes to be true, and that in its argument of this case plaintiff in error has filed a brief which assumes here, as it assumed in the lower court, the very controversy before the court for decision.

We hold that a contract containing the phrase "hops of the crop to be raised and grown by the seller on the following described property", in view of a definite recital contained in the contract that the premises are leased by the sellers, is ambiguous, in that it may refer either to the crop grown on the premises in question, to which the growers may be entitled by reason of their farming of the premises (the construction of the contract adopted by the lower court), or it may refer to the entire crop produced on the premises (the construction suggested by the plaintiff in error in the lower court and here assumed, without argument, to be correct.) In construing a contract, as has often been said, the courts will take a document by its four corners and give force to every clause that may aid in throwing light upon the matter to be decided. If, as counsel for the plaintiff in error suggests, the contract is without uncertainty and provides for the sale of a maximum quantity of hops to be produced upon a definite tract of land, irrespective of whether the sellers own said hops, wherein lies the reason for the phrase "to be raised and grown?" Wherein

lies the necessity for any reference to the fact that the premises were leased? Simplicity and certainty would have been accomplished by merely designating the maximum quantity to be sold and the premises on which the hops were produced. That the parties to this agreement had in mind a different stiuation, and that they did not intend to presently sell or to contract to sell something which the sellers did not own, (although they could lawfully so do had they desired, as is suggested in the brief of plaintiff in error) is established by the inclusion in the contract of the phrases above referred to, which, although in a faulty and ambiguous way, do disclose the intent of the sellers to sell and of the buyers to buy only the hops to which the sellers might become entitled upon the conclusion of their season's work by virtue of farming the premises described in the contract. The contract was intended to protect the seller from any obligation to deliver hops which the seller did not own, whether such eventuality arose by virtue of a bad season and a short crop or by virtue of the conceded obligation which existed in this case to deliver a portion of the crop as rental to the landlord, a portion over which the sellers had no more control or right of disposition than they had over hops produced on entirely different land by persons unconnected with this controversy.

The principle of law which controls the decision in this case is so elementary in character that it is a work of supererogation to cite authorities in support thereof. It may, however, serve to lighten the labors of this court to call attention to decisions of other courts in which able counsel have contended that a contract is certain and un-

ambiguous in meaning, and bears the meaning which an interested client has given it, wherein reviewing tribunals have been unable to agree with such contentions, and have sustained the introduction of parol testimony to make certain that which was uncertain.

In the case of Millett vs. Taylor, 26 Cal. App. 162, a contract was before the court for construction, under the terms of which tenants of farm lands agreed to render "a just and true accounting of all of the affairs appertaining to the conduct of said farm, and that they will deliver to said parties of the first part, or to their order, one equal half part of all the proceeds and crops produced on said farm and premises aforesaid." At page 165 of the opinion the court said:

> "A 'one-half equal part of all the proceeds and crops' is, indeed, a vague and indefinite phrase, and we think that the ruling of the trial court, in permitting evidence extrinsic to the instrument itself, for the purpose of ascertaining what the parties intended to express by the use of that language, was not only perfectly proper but absolutely necessary."

The court then proceeded to state correctly the principles of law which will control the decision in this case, in the following language:

> "It is true, and indeed, elementary, that 'it is no part of the office of construction to add to the contract or take from it, but it is to ascertain what the parties intend by what they have said. If there be

no ambiguity in the contract, it must speak for itself,' (citing authorities) but, where, as is certainly true here, 'the language employed being fairly susceptible of either one of the two interpretations contended for, though at variance to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intentions of the parties'."

The court there upheld the introduction of evidence to show that the lessors were entitled to feed stock on the farm from the crops of hay raised thereon, and that the lessees were entitled to use such of the products of the farm, eggs, butter, milk, etc., as they might reasonably require for themselves or for their family use, and that the lessees had performed their contract when they had delivered to the lessors an equal half part of all of the net proceeds and crops produced on said premises, after the gross proceeds had been diminished by the uses to which various parts thereof had been placed in accordance with the intent of the parties.

In the case of Parks vs. Elmore, decided in 59 Wash. at page 584, a contract was under consideration in which one Jas. W. Parks contracted to sell, and Messrs. El-

more & Co. contracted to buy, certain dog salmon, expected to be caught by Parks, at an agreed price per fish, the salmon being designated as "my entire catch." Parol evidence was permitted to be introduced to explain the meaning of the phrase "my entire catch," in connection with which Parks was shown to be a wholesale fish dealer, who did not personally engage in catching fish, through employees or otherwise, but who was required to and did purchase from independent fishermen, quantities of dog salmon in order to procure the higher grade of silver-sides, and that the independent fishermen required the wholesale dealers to purchase dog salmon in order to acquire such silver-sides. The court held that the dog salmon so purchased were identified by the words "my entire catch" and affirmed a judgment in favor of the respondent, predicated upon such parol testimony and such construction of the contract. This was done over the contention of the appellant that the words "my entire catch" have in themselves a fixed definite meaning, and that parol evidence was not admissible to vary their natural sense. The court, however, held that the word "catch" has no such definite meaning as to not admit of explanation under any circumstances. It may mean different things, depending upon the connection in which it is used; "it may mean the fish caught by the fisherman individually, or it may mean those caught by him and his assistants, or it may mean caught by his gear, operated by third persons entirely. So when we speak of the catch of a cannery, the phrase may still have a different meaning; it may mean the fish brought to the cannery, without regard to the persons by whom they were caught."

So in the case at bar the phrase "hops of the crop to be raised and grown by the seller" may mean one thing when the seller is the owner of the land on which the hops are to be grown, and may mean, and as the lower court found did mean, something entirely different when the seller was a lessee of the premises on which the crop was to be raised and grown. And it was because of the fact that the contract is susceptible of these different meanings, that the court was compelled to hear evidence extrinsic of the contract with respect to the facts and circumstances which surrounded the transaction in order to determine correctly the meaning and intent of this phrase as used by the parties to the contract. The evidence so received was properly received, and when the court was in possession of this evidence, it necessarily found that this contract was not intended to be a dealer's contract covering a future sale of hops, which the seller would acquire when and where he might elect in order to be in a position to perform at the time of delivery, but that it was a grower's contract intended to cover the sale of hops controlled by the seller by virtue of his farming operations in connection with a particular tract of land.

In the case of Brown vs. A. F. Bartlett & Co., 201 Mich. 269, the plaintiff was sued for commissions alleged to have been earned by him under a contract which obligated the company to pay him five per cent. "of the receipts of the company on all orders procured by you for machinery, provided such orders are executed and sold at a profit for the company." In this case the plaintiff was permitted to testify that prior to signing

the agreement, the president of the company, in answer to his inquiry as to what would constitute costs, said, "that costs would be made by adding twenty per cent. for overhead to actual cost of labor and material." The defendant made the contention that the word "profits" had a fixed and definite primary meaning, and that the introduction of the parol evidence offered by the plaintiff in that case violated the same rule which the plaintiff in error contends was violated in the trial of the case at bar. The trial court was upheld, and in so doing, the reviewing court quoted, with approval, at page 278 of the opinion, the following rule:

> "The true doctrine seems to be that, while direct evidence of intention is not admissible in explanation of ambiguous terms in a writing, yet proof of collateral facts and surrounding circumstances, existing when the instrument was made, may be properly admitted, in order that the court may be placed as nearly as possible in the situation of the testator, or contracting parties, as the case may be, with a view the better to adjudge *in what sense* the language of the instrument was intended to be used, and to apply it to the subject matter."

Authority upon the same subject is to be found in a decision of the Supreme Court of Oregon. In the case of McCulsky vs. Klosterman, 20 Ore. 108, the court had under consideration a contract under which the plaintiff was entitled to receive one-third of the net profits of a particular business, to be ascertained by taking an account of stock, "and from the outstanding accounts of the firm there shall be first deducted five per cent. there-

of to cover losses and bad accounts." Contention arose as to the meaning of the words "outstanding accounts." The court stated the respective contentions of the parties at page 111 of the opinion as follows:

> "The argument for the plaintiff is, that the language of the contract cited plainly means that five per cent is to be deducted or allowed for bad accounts from the outstanding accounts, whether the bad accounts in fact amount to that much or not * * * The argument for the defendant is, that there is an immemorial usage or custom among the merchants of Portland to charge all accounts considered uncollectible or bad accounts, to profits and loss, and that such bad or uncollectible accounts are not to be considered or estimated in determining the net profits; that the parties to the contract had full knowledge of such custom and made the contract with reference to it, and that, construing the contract in contemplation of such usage or custom, the provisions of the contract adverted to, only meant, or were intended to mean, that five per cent should be deducted for bad accounts from the outstanding accounts as remained after the uncollectible or bad accounts had been segregated by charging them to profit and loss. It thus appears that the real question at the bottom of the controversy is, how shall bad accounts, to cover losses, be deducted under the contract as provided?—from outstanding accounts, after uncollectible or bad accounts have been segregated and charged to profit and loss, or from the outstanding accounts, including good and bad accounts?"

The court then proceeded to hold that the phrase "outstanding accounts" in a general sense means such accounts as are due, unpaid and uncollectible, including both good and bad accounts which are due and unpaid. It upheld, however, the introduction of parol evidence in that case to show that the phrase "outstanding accounts" in the contract under examination, meant "outstanding accounts" after the good accounts had been segregated from the bad accounts and the bad accounts first deducted from the outstanding accounts. It was strenuously contested that the *proof* so offered was inadmissible because it violated the plain terms of the contract, which needed no extrinsic *proof* to aid in its interpretation. The court recognized the rule but held it inapplicable, and rejected the argument because it was based upon "treating the words in their general sense when the language of the contract, its subject matter, and the usage of trade, show that they have an accepted signification different from their common meaning."

It is the argument of the plaintiff in error in this case that the phrase "crop to be raised and grown by the seller" bears the same meaning, with respect to a lessee, that it bears to an owner. The contract before this court for interpretation proclaims in every material provision that it had to do with hops which were to come into being and thereafter under the control of the seller because of actual production by him, and that it was not intended to cover hops which the seller would be required to buy either from his landlord or in the open market.

In an elaborate note connected with the case of First National Bank of Van Buren vs. Cazort & McGehee Co., 123 Ark. 605, found in 1917 C. L. R. A. (N. S.) page 7, which note covers the sale or mortgage of future and growing crops, the editors point out, at page 30 of the opinion, that one of the chief difficulties to be met with in connection with descriptions of mortgages on future crops is the matter of construction. They say: "In view, however, of the diversity of the situations covered and of the descriptions employed in the cases decided, it is not possible to formulate any general rules, and a discussion of the subject must necessarily be limited to a consideration of the specific decisions."

None of the cases cited in this note is close enough in point of fact to the case at bar to make a detailed consideration of these authorities of interest. However, we call attention to the case of Cobb vs. Daniel, 105 Ala., page 325, in which the court held that the phrase "entire crop grown by me the present year, or which I might aid in or cause to be grown, on my lands, or any other lands that I might cultivate, or aid in or cause to be cultivated," was sufficiently broad in terms to cover "whatever interest J. C. Ragan may have had in the crops," and by necessary implication from the decision in this case it appears that the phrase above set forth was inadequate to include that part of the crops raised in which J. C. Ragan had no interest.

In the case at bar the defendants contend for no construction of the contract subversive of that which would impose on them an obligation to deliver all of the hops

produced on the premises which they acquired and were in position to deliver as the result of such production. It is not disputed that they faithfully delivered all of the hops so owned by them at sixteen cents a pound when the market price for hops was eighty-five cents. But the fact that they faithfully performed the contract to their financial disadvantage is a poor reason that it should be so construed as to impose upon them an obligation which it was never intended that they should bear, and to obligate them to deliver not only the hops produced on the land in question, which they owned and controlled, but also to obligate them to go out in the open market and buy hops, when there is not a phrase in the contract that suggests the idea that they were ever to buy hops to deliver, but the contract, taken by its four corners, can only mean that they were to deliver all of the hops under their control.

The Supreme Court of Arkansas had under consideration, in the case of Blakemore vs. Eagle, 73 Ark. 477, a trust deed covering a future crop, in the following words: "The entire crop of cotton and corn that I may raise or cause to be raised and cultivated during the year 1898 on my plantation known as the Blakemore Place, in Lonoke County." The lower court held that this phrase included all of the cotton grown on the place, not only that raised by Blakemore himself, but some which was delivered to him by his tenants in payment for supplies which Blakemore had furnished them. But the Appellate Court, while conceding that the decision of this point was not necessary to a decision of the case, held: "We are inclined to the opinion that the cotton

delivered to Blakemore by his tenants in settlement of accounts for supplies furnished by him was not, as the court held, covered by the trust deed." If cotton actually grown on the place by the tenant of the landlord and delivered to and owned by the landlord was not covered by a mortgage on "the entire crop of cotton and corn that I might raise or cause to be raised" how much less is it sound in this case to contend that the phrase "crop to be raised and grown by the seller" on leased premises, is so clear in meaning as to preclude the introduction of parol evidence covering the facts and circumstances which surrounded the parties to the contract at the time of its execution, to assist the court in answering the question as to whether that phrase meant every pound of hops that was in fact produced on the premises described in the contract, or only that part of the crop produced, acquired and owned by the seller as a result of his farming operations under the lease.

In conclusion it is only necessary to observe that the legal principle relating to this action is elementary. If the contract as written is lacking in certainty, the judgment of the lower court should be affirmed. The learned trial judge who had the contract to construe felt that he could not properly interpret it without extrinsic aid to develop the facts and circumstances surrounding the parties at the time of its execution, so as to determine their true intent. If the contentions of the defendants in error are correct, he was not only justified but required to receive the evidence which was offered, and the judgment from which this appeal has been taken should be affirmed, or the case sent back for a new trial,

in the event this court should believe there to have been an issue of fact which was improperly withheld from the jury.

Respectfully submitted,

DEY, HAMPSON & NELSON,
GEORGE L. BULAND,

Attorneys for Defendants in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. MAGNUS SONS COMPANY, a corporation,

Plaintiff in Error,

vs.

ADAM OREY and W. J. BISHOP,

Defendants in Error.

No. 3905

PETITION FOR REHEARING

BAUER, GREENE & MCCURTAIN,
Attorneys for Plaintiff in Error and Petitioner.

FILED
MAR 2 - 1923

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. MAGNUS SONS COMPANY, a corporation, Plaintiff in Error, vs. ADAM OREY and W. J. BISHOP, Defendants in Error.	No. 3905 Petition for Rehearing

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Plaintiff in Error, by its attorneys, respectfully petitions the court for a rehearing in this cause on the grounds that it appears by the opinion of the court filed February 5, 1923, that:

I.

The court has misapprehended the record and decided the cause upon issues not in the pleadings as the same had been settled at the time of the trial in the court below.

II.

The court has overlooked the decision of the court below sustaining a motion to strike out parts of the original answer which thereby eliminated from consideration in this review a question which this court holds to be the question at issue.

III.

The court has assumed as proven and decided the cause upon a fact upon which there was conflicting evidence at the trial.

IV.

The court has overlooked an assignment of error predicated upon the refusal of the trial judge to submit to the jury a question of fact upon which there was a conflict of testimony, and upon the assumption of the truth of which fact the lower court peremptorily directed a verdict.

I.

We assume that the conclusion of the court as announced in its opinion filed February 5, 1923, is based only on such parts of the record as are referred to therein. If so, the court failed to consider certain exceptions which were properly before it and the decision as rendered proceeds upon a mistaken assumption of fact. In stating the issues the opinion quotes from the original answer (Trans. p. 13) as follows: "After the owner of said premises had retained one-fourth of the total amount of hops grown thereon as crop-rental for the use of said premises," and in defining the issue to be decided the opinion says: "The crop raised was approximately 40,000 pounds, of which three-fourths were delivered to the plaintiff. The quesiton at issue was whether the remaining one-fourth was included in the

contract so that the defendants were obligated to deliver the same."

That portion of the original answer quoted in the opinion as raising the issue to be decided was specifically moved against by the plaintiff in the court below (Paragraph I of Motion, Trans. p. 20), and the motion was granted in a decision saying that "the motion to strike out the allegations of the answer *with reference to the obligation of the defendants to their landlord and the delivery of hops to him,* and the custom prevailing at the time the contract was made should be allowed" (Trans. 23, 24). Defendants did not apply for a rehearing upon nor seek to review said ruling, but filed an amended answer invoking the equity arm of the court for reformation of the contract (Trans. 26-30). After trial on the Equity side of the court a decree dismissing said defense was entered (Trans. 32-33). No appeal was taken from that decree, and the case went to trial as an action at law (Trans. 33) upon the issues made by the complaint and *what was left of the answer after subtracting both of the further and separate defenses therein* (to which Judge Bean had sustained demurrer), *and the portions stricken out on motion* (Trans 20-24), and the defense of mutual mistake in the execution of the contract. It is apparent therefore that the decision as announced by this court is founded upon an issue not in the case. It was not in the case because it was not in the pleadings at the time of the trial. The court is as much bound by the pleadings as are the parties. The trial court erred in admitting evidence on a point not in

issue and this court is equally in error in affirming such action. The error could only have occurred through misapprehension of the state of the record, although the point was covered by due assignment and specification of error, and was adverted to both in the brief and in oral argument.

In this connection the court has misapprehended the record in another respect. The statement of the case in the opinion says: "The defendants further alleged the existence of a custom and usage in the hop business, that hop ranches were leased upon a crop rental rather than upon a cash rental." There is nothing to show to what extent this finding controlled the decision of the court. It has no place in the decision, because a demurrer (Trans. 21) to the second further and separate defense in the original answer in which said alleged custom and usage is pleaded (Trans. 17-19) was sustained by Judge Bean (Trans. 23-24), and upon the trial Judge Wolverton excluded evidence offered by the defendants to prove the alleged custom and usage saying:

> "As to this matter of custom and usage, the custom was set up in the original answer, and that was stricken out by Judge Bean, so that matter is not now in the pleadings, so far as the law action is concerned. The defendants in this case have amended their answer, and set up an equitable defense, and in that custom and usage were pleaded. The court, as you know, heard that equitable defense, and found, after hearing testimony, that the proof did not sustain the answer, and that disposed

of the equitable matter, and with that, it disposed of the equitable answer. So there is no custom pleaded here now. I doubt very much whether the matter of custom has a great deal to do with the case." (Trans. 45.)

Since it was no longer in the pleadings how could it possibly have anything to do with the case?

II.

The opinion overlooks the fact that the attack upon the original answer which resulted in stripping it of irrelevant matter was more specific than a general demurrer. There was a demurrer to each of the separate defenses, *and also a motion separately to strike specified parts of the entire answer* (Trans. 20-21). The portions of the answer against which the motion to strike was interposed are set forth in the Transcript in italics (Trans. 13-17). Not only were demurrers sustained, *but the motion was granted in its entirety* (Trans. 24), and it is the latter ruling which is important in this review but it is not noticed in the decision of this court.

In discussing plaintiff's contention that Judge Bean's ruling fixed the law of the case the opinion says: "Judge Bean overruled *(sic)* the demurrer to the first answer on the ground that 'it did not allege what the original contract was or that by mutual mistake the provisions permitting delivery of hops to the landlord was omitted.'" The demurrer was *sustained* on the ground stated, not overruled (Trans. 24). This *lapsus calami* may be the result of the *lapsus linguae* of the trial judge

in referring to the "motion to strike the *complaint*" (Trans. 20-21), and is undoubtedly inadvertent and unimportant. We do not complain of accidental errors in terminology, but had counsel made similar mistakes in referring to a perfectly plain record of a case under review he would be open to the charge of unfamiliarity with the issues upon which he assumed to aid the court to a correct decision. The point we now stress is that by implication the opinion appears to hold that Judge Bean's remark to the effect that he found no ambiguity in the contract in suit is *obiter,* and hence that Judge Wolverton, before whom the case was subsequently tried, was not bound thereby, and did not err in admitting evidence on the theory that there was an ambiguity; that the rule of Law of the Case does not apply. The opinion concludes: "What Judge Bean actually decided, was that no case was made by the original answer for the reformation of the contract. We find nothing counter to that decision in any of the rulings of Judge Wolverton".

This is not an appeal from the decree dismissing the amended answer praying reformation. Judge Wolverton's ruling in that behalf is unexceptionable. He held that there was no mutual mistake of the parties in the execution of the contract and, in effect, that a court of equity was not justified in changing the provisions of a contract which the only party responsible for its terms had carelessly drawn (Trans. 35-36, 45). *The error complained of in this review is predicated upon Judge Wolverton's rulings after the equity case was disposed*

of and the cause transferred to the law docket. He was there confined to the issues then remaining, and was bound by the rulings theretofore made in settling those issues whether those rulings were upon demurrers or upon motions to strike. The ruling upon the motion was the important thing, and this was recognized by him in refusing defendants' permission to amend the answer during the trial, where he said: "If you amended your answer it would have to be amended in such a way *as to meet the objection that Judge Bean has ruled upon in this case, because that becomes the law of the case now. I could not permit you to amend so as to set up the same matter that he has stricken out"* (Trans. 46). We press upon the attention of the court the matter stricken from the answer by Judge Bean and urge an inspection of the italicized portions of the original answer as printed at pages 13 to 17 of the Transcript. A comparison thereof with the specifications of plaintiffs' motion to strike (Trans. 20-21) will demonstrate that the matter which Judge Wolverton did not allow defendants to reimport into the case by an amendment at the trial includes not only the plea of custom and usage *but also the allegations of the identical matter upon which the decision of this court is founded.* What Judge Bean decided upon the *demurrer* to the first separate defense of the original answer has no bearing upon this review, but what he decided upon the *motion to strike* has a most important bearing, because it is upon the matters stricken by that ruling that this court apparently has based its decision.

Since the averments referred to were severally attacked by motion on the ground that each of them is irrelevant and immaterial, Judge Bean's remarks in announcing his decision granting the motion to strike obviously were not *obiter dictum*. The motion definitely challenged the right of the defendants to plead that the contract meant anything else than its terms imported. By that motion Judge Bean was called upon unequivocally to decide whether the contract set up in the complaint, its execution having been duly admitted by the answer, was open to the defensive matters moved against. That he so understood the question is manifest by his statement: "Defendants in their answer alleged, among other things, that they were lessees under a contract by the terms of which they were required to deliver a certain part of the hops to the landlord, that they did make such delivery, and delivered the remainder to plaintiff, which they claim was a compliance with their contract" (Trans. 22). The points raised by the motion, and thus stated by the learned Judge, are entirely separate and distinct from points raised by other paragraphs of the motion, and by the demurrers. For instance, in another paragraph of his opinion Judge Bean refers to the allegations of the answer respecting the custom of trade; and then in another paragraph he discusses the allegations of the first separate defense concerning the alleged mistake, and correctly sustained the demurrer thereto on the ground, as quoted in the opinion of this court, that the answer "did not allege what the original contract was or that by mutual mis-

take the provision permitting the delivery of hops to the landlord was omitted".

But the misapprehension which this petition seeks to remove lies in the assumption that Judge Bean decided nothing else than that the demurrer was well taken, or that whatever else he did decide has not sufficient bearing upon the questions raised by this review to merit mention in the court's opinion. The ruling on that demurrer led to the filing of an amended answer which properly raised an equitable defense, but that defense was resolved against the defendants (Trans. 32-33) and both it and the demurrer which led to it and Judge Bean's ruling on that demurrer became merely a part of the history of the case. The ruling on the motion to strike, however, raises the important point in this case, but we find no discussion of or decision of the assignments of errors which alone bring it here for review. On the issue expressly raised by the motion, as above quoted from Judge Bean's opinion, he said: "The contract itself, however, is very definite and certain. It provides for the delivery of a certain number of pounds of hops, of the crops grown by defendants during a certain year on certain premises. There were no exceptions in the contract. * * * I take it, therefore, the motion to strike out the allegations of the answer *with reference to the obligation of the defendants to their landlord and the delivery of hops to him, and the custom prevailing at the time the contract was made should be allowed"* (Trans. 22-23).

Now, as we have said, and it is too plain for argu-

ment, this was not *obiter dictum*. Judge Bean to whom the motion was submitted had to do one of three things: either ignore the motion entirely; or hold the contract ambiguous and therefore open to the defense moved against; or hold the contract definite and certain and therefore not open to explanation. He did the latter and granted the motion. The question was in no sense collateral and his opinion was necessary and essential to the disposition he made of the motion. That decision was never modified nor appealed from, and therefore, as Judge Wolverton remarked at the trial, "it became the law of the case" (Trans. 46), although in admitting evidence and in charging the jury, he wholly disregarded the effect thereof. In other words, and adopting the rule announced by this court in *Presidio Mining Co. v. Overton, 261 Fed. 933,* and applying the same to the allegations of the answer with reference to the obligation of the defendants to their landlord and the delivery of hops to him: *The insufficiency of the original answer thereupon became res judicata in the subsequent proceedings before Judge Wolverton.*

This court quotes the remark of the trial judge: "I have read that opinion of Judge Bean's and gone into it pretty thoroughly, and I might say further, I have consulted Judge Bean about it and I am of the opinion that that decision does not decide the exact question which is now before us" (Trans. 43), as showing that Judge Wolverton did not regard Judge Bean's decision as the law of the case. Whether he so regarded it or not is beside the question. Plaintiff assigns errors pred-

icated upon rulings which disregarded that decision as the law of the case. What is the purpose of settling the issues in advance of trial? Are solemn decisions upon questions of law properly raised by motion or demurrer to be lightly brushed aside at the trial? Are parties never concluded, but compelled at all stages of a lawsuit to re-litigate questions supposed to be settled? Having obtained, upon full hearing and due consideration, a ruling to eliminate irrelevant matter from the pleadings are they bound at their peril to be prepared with witnesses at the trial to disprove some alleged fact upon which the court has decided no evidence is admissible? Is the District Court of the United States a moot court until the day of the trial? Judge Wolverton omitted to state what, if anything, Judge Bean said about his own decision, and in common with this court we are therefore deprived of the advantage of his construction of his own language. Not that it needs any construction. Its terms could not be made clearer nor more definite. The record shows no modification or change in that decision or the order based thereon, and it must therefore be given full faith and credit. Counsel are bound by the official record and so are appellate courts. This petition seeks not Judge Wolverton's opinion of that decision, but the ruling of this court as to whether that decision settled certain issues in this case precluding further inquiry in respect thereof.

If there is any such doctrine as "the law of the case" Judge Wolverton was bound by Judge Bean's decision on the motion and no evidence on any of the matters he

had stricken from the case was admissible. Nor, for the reason that it was not appealed from nor reviewed, is Judge Bean's ruling in that regard open to question in this court. Defendants could have stood upon their original answer and the decisive question of whether they could plead and prove a provision not found in a contract they themselves wrote, could have been raised for determination here. Then, had this court not been "convinced that the contract was of such certain and unambiguous nature as to preclude the admissibility of such testimony", Judge Bean would have been reversed. But defendants waived that prospect and filed an amended answer resting their entire defense on the theory that the contract as written meant exactly what it said and what plaintiff claimed for it, but that by mutual mistake the contract as written had omitted an important reservation, namely, one-fourth of the crop. That issue as heretofore stated was resolved against them and no appeal therefrom was taken. After Judge Bean's decision on the motion defendants themselves no longer had the temerity to claim that their contract obligated them to any less than a delivery of the entire crop and for that reason they elected to seek reformation in equity. We do not charge, because we do not believe, that they were thereby speculating with justice and intended, if defeated in reformation, to return to the same defense at law which Judge Bean had branded with the bar sinister.

The pertinent inquiry, then, on the trial of the law action before Judge Wolverton and jury, was what

issues had already been settled? What was left open for decision? *(Hadden v. Natchaug Silk Co., 84 Fed. 80.)* Judge Bean's dicision on the motion had eliminated all questions relating to the obligation of the defendants to their landlord, terms of their lease with him, delivery of hops to him, custom of trade, etc.; in short, every question predicated upon an assumed ambiguity in the contract. Assignments of error numbered from 1 to 28 (Trans. 103-118; Plaintiff's Brief, 14-15) cover errors of the trial judge in admitting testimony on those questions in violation of the rule, and the opinion of this court affirms his rulings on the ground that there was nothing therein counter to Judge Bean's decision "that no case was made by the original answer for reformation of the contract." Certainly there was not; but this statement in the opinion begs the question which is *were those rulings counter to Judge Bean's decision on the motion?*

His decision on the demurrer to the first separate defense in the original answer has nothing whatever to do with the errors complained of and sought to be reviewed in this proceeding. His decision on the points raised by the motion to strike portions of the original answer has everything to do therewith and this petition seeks the judgment of the court thereon.

If the issues raised by the matter stricken by Judge Bean are not in the case, plaintiff is entitled to recover. They were squarely, definitely and unequivocably ruled out by Judge Bean's decision on the motion to strike them out. If the trial judge was bound by that ruling then his admission of the testimony objected to, his direc-

tion of a verdict for defendants, and his refusal to direct a verdict for plaintiff constitute reversible error.

III. and IV.

Independently of, and without regard to the points above urged, the decision of this court shows a misapprehension upon another point equally fatal to an affirmance of the judgment below. It assumes as proved a fact upon which there was a conflict of evidence. In the statement of the case the opinion recites that plaintiff knew that Hop Lee, defendant's lessor, was to have one-fourth of the crops as rental, and on the third page of the opinion it is again stated "the plaintiff knew that defendants were required to pay one-fourth of the crop as rental to their landlord", and on page 4: "We think it was not error therefore to permit a witness to testify that he told the plaintiff before the contract was entered into that the hop yards were leased upon one-quarter rental". A witness for the defendants, in relating his conversation with plaintiff in Chicago before the contract was executed said: "After we got finished talking I told him that the ones I represented (defendants) leased the yards. He asked me how we leased the yards. I told him we paid crop rents. *I think he asked me how much and I told him one-quarter*" (Trans. 73). On the other hand plaintiff's witness, in his disposition taken long before the trial, testified that *he knew nothing about the terms and conditions of the lease, nor whether it was a crop lease or a cash lease, nor that the lease*

provided that the landlord was to have one-fourth of the crop. (Trans. 85.)

Here was conflicting testimony on the very point which this court has found decisive of this case. As we read the opinion, if plaintiffs did not know when they signed the contract prepared by defendants themselves that one-fourth of the crop was to go to the landlord, plaintiff is entitled to recover. We think that question was decided and foreclosed by Judge Wolverton's decision and decree in the equity case where he held that there was no mutual mistake in the contract, that defendants made a mistake or were not careful enough in drawing their contract, but there was no showing that there was a mistake on the part of the purchaser in the formation of the contract (Trans. 35). We have also shown that upon other grounds the point was not within the issues framed by the pleadings before the court at the time of the trial of the law action. But waiving that argument for the nonce, and considering the present point as if the question of plaintiff's knowledge of the terms of defendant's lease with Hop Lee was properly in issue under the pleadings, and had not been foreclosed by the previous decree nor by any previous ruling, how stands the record?

At the conclusion of the trial to a jury the fact had been affirmed by a witness on one side and denied by a witness on the other. The court thereupon proceeded to comment on the evidence and upon the credibility of one of the witnesses, and stating his belief of the testimony of defendants' witness, peremptorily directed the

jury accordingly to return a verdict for the defendants (Trans. 91-92). True, the trial judge attempted to point out what he was pleased to term a "very plain contradiction" in the testimony of plaintiff's witness on the point, but it was exclusively the function of the jury to pass on that question. It was for the jury to say whether plaintiff's witness had contradicted himself. It was the undoubted right of plaintiff's counsel to argue that matter to the jury. Whether the testimony of that witness was inconsistent or self-contradictory is a matter of construction, and while the court's duty to construe doubtful writings where they are doubtful, and instruct the jury accordingly is unquestioned, it is error, always and everywhere, for the court to exercise that function respecting the statements of witnesses. *(Hickman v. Jones, 9 Wall. 197; 19 L. ed. 553.)*

The opinion says (page 2): "The jury found for the defendants and judgment was entered accordingly". But the jury did not so find. It had no opportunity to make a finding on anything. The court took the consideration of that fact away from the jury (Trans. 100). It is of that action of the court amongst others that we complained by writ of error, and it is the failure of this court to reverse that action or even to notice it that we now complain. It is assigned as error (Trans. 120-123), specified for discussion (Plaintiff's Brief 15), and fully discussed at pages 46 to 51 of the brief.

We are not unmindful that in instructing juries Federal Courts are not bound by State laws or practice and may fairly and impartially comment on the evidence, but whatever may be the opinion of the trial judge as to the credibility of a witness or the facts testified to. the jury

must ultimately determine as to the truth of he tesimony, and this rule is as inflexible in the Federal Courts as it is elsewhere (*Nyback vs. Champagne Lumber Co.*, 109 F. 737; *Coulter v. Thompson Lumber Co.*, 74 C. C. A. 38, 142 Fed. 706). We waive the question whether Judge Wolverton's comment was either fair or impartial; but challenge his right to take the decision of the truth from the constitutional triers of fact. Nor would the fact that defendant offered the evidence for the purpose of aiding the court to interpret the contract make any difference. Even for that doubtful purpose the court had no right to base his interpretation of a written contract upon conflicting evidence of an extraneous fact upon which, according to the court's theory, the construction to be given to the contract and the final decision of the case depended.

This court has, we believe, through misapprehension, adopted the same theory, namely, that knowledge by the plaintiff of the reservation of one-fourth of the crop as rental in defendants' lease of the premises justified the trial court's construction of the contract. The unsoundness of this theory and the admissibility of evidence to sustain it is discussed elsewhere. The immediate point is that the fact of knowledge of the plaintiff on that subject can be found only by passing on the credibility of witnesses and holding the scales between conflicting testimony,—a function which ought to have been left to the jury but was not.

In an application of this kind it is not in order to re-argue questions decided by the opinion but we feel

justified in reminding the court that apparently it has overlooked important clauses in the contract which ought to be considered in determining whether defendants thereby covenanted to sell all of their crop up to 60,000 pounds. They covenanted that the contract "shall have preference both as to *quantity* and quality *over all other contracts* made as to said growth of hops;" that they had *"made no other contract* for the sale of any part of said crop of hops"; that should they sell said hops or any part thereof to another, or refuse to deliver the same to plaintiff, the latter should be entitled to all advances made and damages, and finally, as security for advances made by plaintiff, the contract constitutes a pledge and mortgage of *"the entire crop of hops to be raised upon the premises above described in the year 1919".* The buyer complied with the terms of the contract in all particulars and made the advances called for on the basis of the crop up to 60,000.

We are probably also foreclosed from questioning the court's statement to the effect that it is not to be supposed that defendants could with any certainty bind themselves to acquire for delivery to plaintiff, hops they did not own. That returns to the main question. If they *did* so bind themselves a supposition cannot relieve them, and they must be held to have assumed the alternative consequences of acquiring the crop or of paying damages. If it is not to be supposed that a man will bind himself to something he knows he cannot perform, it is equally to be supposed that when he does bind himself he must be held to have intended to perform.

Reverse the situation of the parties. Suppose the contract in precisely the same terms had been written by plaintiff and it had agreed to take and pay for "sixty thousand pounds of hops of the crop to be raised and grown by the seller" at 85 cents per pound, and the market price at time for delivery had dropped to 16 cents per pound; and suppose sellers had tendered delivery of the entire crop of 40,000 pounds raised by them that year, and buyers had refused to take or pay for more than 30,000 pounds on the pretext that they had intended to buy only the *seller's share* of the crop and not the one-fourth of the crop which sellers owed their landlord as crop rental, would the provision of the contract for damages to be recovered by defendants in event of such default (Trans. 10) apply? Suppose further, that buyers had brought their bill for reformation of the contract on the ground of mutual mistake seeking to have a court of equity insert into the contract the words "seller's share," or "three-fourths of the crop," and the court had found no mistake and dismissed their bill? Would this court listen with patience to the buyer's subsequent attempt when sued at law for damages, to have the court in a trial to a jury, reform its contract on the ground of its own mistake, in the exact form that had been refused in equity, by taking its own statement as true against the emphatic denial of the seller, and without allowing the jury to say whether it told the truth or not?

We cannot believe that this court would permit such a judicial travesty to prevail. It would amount to a

monstrous perversion of many of the elementary doctrines of the law of contracts and of evidence, violate well settled rules of judicial procedure, and deny fundamental rights to a litigant.

Following the example set by *Mr. Justice Harris* of the Oregon Supreme Court in *Malloy v. Marshall-Wells Hardware Co.,* 90 Or. at p. 334, we borrow, but at greater length, the language used by John Philpot Curran when presenting a motion for a new trial in the celebrated Rowan case ("Speeches of Curran," Callaghan & Co. 1877).

"I call upon the example of judicial character; upon the faith of that high office which is never so dignified as when it sees its errors and corrects them, to say, that the court was for a moment led away, so as to argue from the most seductive of all sophisms, that of the *petitio principii.*"

Respectfully submitted,

BAUER, GREENE & McCURTAIN,

For Plaintiff in Error.

State and District of Oregon, }
Multnomah County, } ss.

I, Thomas G. Greene, of counsel for Plaintiff in Error, hereby certify that in my judgment the foregoing

petition for a rehearing is well founded, and that the same is not interposed for delay.

February 28, 1923.

Thomas G. Greene

Of Counsel for Plaintiff in Error and Petitioner.

No. 3906

United States Circuit Court of Appeals

For the Ninth Circuit.

AKTIESELSKAPET BONHEUR, a Corporation,
Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation, Claimant of the American Steamer "BEAVER," Her Tackle, Apparel, Engines, Boilers, Furniture, etc.,
Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

FILED
AUG 28 1922
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3906

United States

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In the District Court of the United States in and for the Northern District of California, First Division.

No. 16,303.—IN ADMIRALTY.

AKTIESELSKAPET BONHEUR,

Libelant,

vs.

American Steamer "BEAVER," Her Tackle, etc.,

Respondent,

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Claimant.

Praecipe for Apostles.

To the Clerk of the Above-entitled Court:

Confirming our request for the preparation of the apostles on appeal conveyed to you on April 20th last, we hereby respectfully request that you prepare, in accordance with Rule 4, in Admiralty, of the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on appeal of said above-entitled cause to said Circuit Court of Appeals, and send said Apostles to said Circuit Court of Appeals, with all convenient speed.

Dated, August 3d, 1922.

NATHAN F. FRANK,
IRVING H. FRANK,
Proctors for Libelant.

[Endorsed]: Filed Aug. 3, 1922. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.
[1*]

[Title of Court and Cause.]

No 16,303

Statement of Clerk, U. S. District Court.

PARTIES.

Libelant: AKTIESELSKAPET BONHEUR, a Corporation.

Respondent: The American Steamer "BEAVER," her Tackle, Apparel, Engines, Boilers, Furniture, etc.

Claimant: SAN FRANCISCO & PORTLAND STEAMSHIP CO., a Corp. [2]

PROCTORS.

For Libelant: NATHAN H. FRANK, ESQ., and IRVING H. FRANK, ESQ.

For Respondent and Claimant: FARNHAM GRIFFITHS, ESQ., and McCUTCHEN, OLNEY, WILLARD, MANNING & GREENE.

PROCEEDINGS.

1917.

November 12. Filed liable for damages in the sum of $230,000.00.

Issued monition, which was returned and filed with the following return endorsed thereon:

"In obedience to the within Monition, I attached the Am. Str.

*Page-number appearing at foot of page of original certified Apostles on Appeal.

"Beaver," etc. therein described, on the 12th day of Nov. 1917, and have given due notice to all persons claiming the same that this Court will, on the 27th day of Nov., 1917 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named Am. Str. "Beaver" and placed a keeper in charge thereof. I further return that I served a copy of this writ on the 2nd officer C. Quistguard, at the Union Iron Works at San Francisco.

J. B. HOLOHAN,
United States Marshal.
Otis R. Bohn,
Deputy.

San Francisco, Cal. Nov. 12, 1917."

16. Filed claim of San Francisco & Portland Steamship Company, a corporation to Steamer "Beaver."

Filed stipulation that Steamer "Beaver" may be released on the filing of admiralty stipulation in the sum of $250,000.00

November 16. Filed admiralty stipulation in the sum of $250,000.00. [3]

27. Proclamation duly made.

December 15. Filed claimant's answer to libel.

1918.

May 24. Filed deposition of Frederick Johan Ellertsen.

June 17. Hearing of cause. Hon. M. T. Dooling, Judge, presiding.

20. Filed testimony taken in open court.

December 18. Further hearing was this day had. The Hon. M. T. Dooling, Judge, presiding. Cause submitted.

Filed stipulation as to testimony of John B. White.

Filed deposition of L. L. Richards.

Filed deposition of J. B. Smull.

26. Filed additional testimony, taken in open court.

1919.

February 4. Filed deposition of L. K. Siversen.

Filed deposition of Joseph Blackett and Frank H. Evers.

1921.

January 21. Filed deposition of Oliver Pehr Rankin.

September 23. Filed opinion in which it was ordered that a decree be entered in favor of libelant for the amount expended for repairs only, and referring the cause to a U. S. Commissioner to ascertain a report same.

October 7. Filed interlocutory decree.

1922.

March 3. Filed stipulation submitting to the Court certain disputed items of damage. [4]

March 7. Filed order that final decree be entered in favor of libelant for the sum of $58,096.15, with interest from December 21st, 1917, at 6 per cent, and cost of suit.

11. Filed final decree.

April 17. Filed notice of appeal.

24. Filed cost bond on appeal.

July 20. Filed assignment of errors. [5]

In the District Court of the United States in and for the Northern District of California, Division One in Admiralty.

AKTIESELSKAPET BONHEUR, a Corporation, Libelants.

vs.

AMERICAN STEAMER "BEAVER," Her Tackle, Apparel, Engines, Boilers, Furniture, etc., Respondent.

Libel in Rem.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States in and for the Northern District of California, Division One:

The Libel of Aktieselskapet Bonheur, a corporation, against the American Steamship "Beaver," her tackle, apparel, engines, boilers, furniture, etc.,

and all persons intervening for their interests therein in a cause of collision, civil and maritime, alleges:

I.

That at all times hereinafter mentioned Aktieseskapet Bonheur, a corporation, was and still is a corporation organized under and by virtue of the laws of the Kingdom of Norway, and at all of said times was and still is the owner of the Norwegian motor vessel "Bayard."

II.

That heretofore, to wit, on the 3d day of November, 1917, the said motor vessel "Bayard" was lying at anchor in [6] the harbor of San Francisco, opposite pier 30, and about one mile distant therefrom, and was then and there in a safe and proper anchorage, her anchor lights burning brightly and was otherwise complying with all of the rules and regulations with respect to vessels at anchor in said harbor.

III.

That on the evening of the said 3d day of November, 1917, the steamer "Beaver" left her dock at Pier 2 for a voyage from the port of San Francisco to the port of Portland, Oregon; that after backing out into the bay she was headed to the southward in which direction she proceeded ahead for the purpose of turning around in order to come upon her course down the bay toward the Golden Gate, and having straightened out on her course, the said steamer "Beaver" proceeded down said harbor, and as libelant is informed and believes, and therefore alleges, at full speed, and at 7:30 P. M.

of said day ran into and collided with the said motor vessel "Bayard." That at the time of said collision the air was clear and the lights of said "Bayard" were clearly visible from the decks of the said Steamer "Beaver," as well as from the shore upon the San Francisco side of said bay.

IV.

That said "Beaver" struck said "Bayard" on her bow, inflicting serious damage to her hull, machinery and equipments; that the bow of said "Beaver" passed under the starboard anchor chain of said "Bayard," and said "Beaver" swung along side the starboard side of said "Bayard," smashing the accommodation ladder and doing other damage. That both vessels then drifted down the bay and the anchor of the said "Bayard" fouled some wire, the nature of which this libelant is ignorant. [7]

V.

That said collision was due to the carelessness and negligence of the officers and crew then in charge of said Steamer "Beaver."

VI.

That as a result of said collision the said "Bayard" has suffered serious damages in her hull, machinery and equipment, and the said owners will be further damaged by the detention of said vessel during the time required for her repairs, in the loss of the use of said vessel, and for incidental expenses relating to and arising out of said collision, the amount of which several damages libelant is not at present informed, but verily believes and

therefore alleges that the same will exceed the sum of Two Hundred Thousand ($200,000) Dollars.

VII.

That the Great Western Power Co., a corporation, claims that, as a result of said collision, the anchor of said "Bayard" fouled and damaged its electrical cable lying on the bottom of the bay of San Francisco, and has preferred a claim for said damage against the said "Bayard" in the sum of Thirty Thousand ($30,000.) Dollars.

VIII.

That the said "Beaver" is now in the harbor of San Francisco, in the Northern District of California, and within the jurisdiction of this Honorable Court.

IX

That all and singular the premises hereinbefore set forth are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE said libelant prays that process in due form of law according to the course of this Honorable Court [8] in cases of admiralty and maritime jurisdiction may issue against the said American Steamer "Beaver," her tackle, apparel, and furniture, and that all persons having any interest therein may be cited to appear and answer, on oath, all and singular the matters aforesaid; and that this Honorable Court would be pleased to decree the payment of the said sum of Two Hundred and *Thirty* (*$230,000*) Dollars, together with interest and costs to this liability, and that said vessel

may be condemned and sold to pay the same; and that this liability may have such other and further relief as in law and justice it may be entitled to receive.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelant.

State of California,
City and County of San Francisco,—ss.

Fritz S. Olsen, being first duly sworn, on oath deposes and says:

That he the manager of the firm of Fred Olsen & Company, managers of Aktieselskapet Bonheur, a corporation, libelant herein; that he has read the foregoing libel, knows the contents thereof and that the same is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

FRITZ S. OLSEN,

Subscribed and sworn to before me this 12th day of November, 1917.

[Seal] M. I. LAWRENCE,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires January 27th, 1918.

[Endorsed]: Filed Nov. 12, 1917. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [9]

[Title of Court and Cause.]

No. 16, 303.

Answer.

To the Honorable the Judges of the United States District Court for the Northern District of California:

The answer of the San Francisco & Portland Steamship Company, a corporation, claimant herein, to the libel of Aktieselskapet Bonheur, a corporation, libelant herein, admits, denies and alleges, as follows:

I.

Claimant is unadvised as to the truth or falsity of the allegations of article I of said libel, and for that reason denies the same, and demands that strict proof thereof be made.

II.

Answering unto the allegations of article II of said libel, claimant admits that heretofore on the 3d day of November, 1917, the said motor vessel "Bayard" was lying at anchor [10] in the harbor of San Francisco, approximately opposite pier 30, and about one mile distant therefrom, and admits that she was then and there in a proper anchorage, but denies that her lights were burning brightly. Claimant is unadvised as to whether said "Bayard" was otherwise complying with all of the rules and regulations with respect to vessels at anchor in said harbor, and for that reason denies the same, and demands that strict proof thereof be made.

III.

Answering unto the allegations of article III of

said libel, claimant admits that on the evening of said 3d day of November, 1917, the steamer "Beaver" left her dock at pier 30 for a voyage from the port of San Francisco to the port of Portland, Oregon, and admits that after backing out into the bay she was headed southward in which direction she was proceeding for the purpose of turning around in order to come upon her course down the bay toward the Golden Gate, and admits that having straightened out on her course the said "Beaver"' proceeded down said harbor, and admits that at about 7:30 P. M. of said day, said steamer ran into and collided with said motor vessel "Bayard," but claimant denies that at the time of said collision said steamer "Beaver" was proceeding at full speed. Claimant denies that at the time of said collision the air was clear, and that the lights of said "Bayard" were clearly visible from the decks of said steamer "Beaver," and denies that they were visible from the shore upon the San Francisco side of said bay. Except as herein expressly admitted, claimant denies each and every of the remaining allegations of said article. [11]

IV.

Answering unto the allegations of article IV of said libel, claimant admits that said "Beaver" struck said "Bayard" on her bow, inflicting serious damage to her hull, but denies that any serious damage was inflicted to the machinery or equipment of said "Bayard." Claimant admits that the bow of said "Beaver" passed under the anchor chain of said "Bayard" and that said "Beaver"

swung along the starboard side of said "Bayard," but as to whether she smashed the accommodation ladder and did other damage as in said article alleged claimant is unadvised, and for that reason denies the said allegation, and demands that strict proof thereof be made. Claimant admits that both vessels then drifted down the bay, but denies that the anchor of said "Bayard" fouled any wire.

V.

Claimant denies each and every of the allegations of article V of said libel.

VI.

Answering unto the allegations of article VI of said libel, claimant admits that as a result of said collision said "Bayard" suffered serious damages to her hull, but denies that she suffered any damage to her machinery and equipment. Claimant denies that the owners of said "Bayard" will be or were further damaged by the detention of said vessel during the time required for her repairs in the loss of the use of said vessel, but is ignorant as to whether said owners would be further damaged for incidental expenses relating to and arising out of said collision as in said article alleged. Claimant denies, however, that the damages resulting from said collision amounted to the sum of Two Hundred Thousand (200,000) Dollars or anywhere near [12] that amount. Except as herein expressly admitted, claimant denies each and every of the remaining allegations of said article.

VII.

Claimant is unadvised as to the truth or falsity of the allegations of article VII of said libel, and

for that reason denies the same, and demands that strict proof thereof be made.

VIII.

Claimant admits the allegations of article VIII of said libel.

IX.

Answering unto the allegations of article IX of said libel, claimant denies that all and singular the premises thereinbefore set forth are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant.

[13]

State of California,
City and County of San Francisco,—ss.

G. L. Blair, being first duly sworn, deposes and says:

That he is an officer of the San Francisco & Portland Steamship Company, claimant herein, to wit, the manager thereof, and makes this verification for and on behalf of said claimant; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

G. L. BLAIR,

Subscribed and sworn to before me this 13th day of December, 1917.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Receipt of a copy of the within answer is hereby admitted this 13th day of December, 1917.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelant.

Filed Dec. 15, 1917. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [14]

[Title of Court and Cause.]

No. 16,303.

Testimony Taken in Open Court.

Monday, June 17, 1918.

Counsel Appearing:

For the Libelant: NATHAN H. FRANK, Esq.

For the Respondent: FARNHAM T. GRIFFITHS, Esq.

Mr. FRANK.—If your honor please, this is a case of collision. The steamer "Bayard" was lying at anchor off the wharves in San Francisco Bay here on the evening of November 3d, and the "Beaver" on her way out collided with her and injured her very seriously. The respondent has agreed to admit liability, and there are two questions involved after we have the admission of liability. When the amount of the damages to be allowed for the collision and for the repairs, I mean, and the attendant expenses, and the other is the question of demurrage. Now, with [15] reference to the first, as I understand, Mr. Griffiths, the chances are that we will be able to get together on

that and you no not care to submit anything upon that proposition at this hearing?

Mr. GRIFFITHS.—That is right.

Mr. FRANK.—The principal question is whether or not we shall be allowed demurrage during the time that the vessel was delayed by reason of the repairs, and at what rate—how much.

Mr. GRIFFITHS.—I would say just this, your Honor, that in respect to the physical damages, as Mr. Frank has correctly stated, I do not think there will be any serious dispute. We do reserve this point: There is an agreement between the parties that the repairs should be made by the Union Iron Works, and that the repairs, if so made, should be without question at the cost or time, if made at the going costs and going time by the Union Iron Works.

The COURT.—The repairs have not yet been made?

Mr. GRIFFITHS.—They have been made, under that letter, but no overtime was employed, except I think for Sundays and perhaps one evening. Now, our point is this, that if this vessel was, as the libelant claims, free to sail and had up to her a charter, which was worth something like $4000 a day, then overtime should have been used upon the repairs to the vessel. If, however, the claim for demurrage applies, there will be no question at all about the bills of the Union Iron Works for the repairs. However, that awaits the determination of the demurrage. Our point is that the vessel was not free to sail from November 3d to December

21, during which time she was under repairs, and even if free to sail was not free to sail under the charter, which I understand Mr. Frank proposes to prove.

Mr. FRANK.—We first offer in evidence the agreement of which Mr. Griffiths has spoken, and I will read that for your Honor's information.

"November 8, 1917.

"Nathan Frank, Esq., Merchants Exchange Building, San Francisco, [16] California. Dear Sir: "—I wish your Honor to remark the language in this, because this question of overtime or not overtime might be absolutely determined by this agreement. By the way, I want to offer the suggestion at this time that it is our view with regard to the question of overtime that these parties are foreclosed, not only by the agreement, but by the fact that they never made any suggestion of using overtime during the repairs. It was agreed between us that we would each have our surveyors, two surveyors, and each would get together and agree upon the specifications and the repairs that were to be made, and those surveyors on behalf of the respondent in this case went down there and were in attendance all the time; they knew what was going on. If there was any question that they were not repairing in a way agreeable to them it should have been raised then; but aside from that, we are relying upon the language of that agreement and what we contend is the proper interpretation of that language, an agree-

ment upon their part for straight time. Now, I will continue:

"If the repairs to the 'Bayard' of the injuries resulting from her collision with the steamer 'Beaver' are repaired by the Union Iron Works Company on the basis of time and materials at going rates, the owners and underwriters of the 'Beaver,' if that vessel is ultimately held liable for the collision, will not question the propriety of that method of repair. This is entirely without prejudice to the question of liability for the collision.

To further eliminate as far as possible controversy over the character of repairs to be made, we suggest that it would be well to permit the surveyors for the owners and underwriters of the 'Beaver' to join with the surveyors for the owners and underwriters of the 'Bayard' in preparing specifications for the repairs. This, also, is without prejudice to the question of liability for the collision. Respectfully yours, San Francisco & Portland Steamship Company, by G. L. Blair, General Manager." [17]

I will ask to have that marked as an exhibit in the case.

(The document is marked Libelant's Exhibit 1.)

Testimony of Duval Moore, for Libelant.

DUVAL MOORE, called for the libelant, sworn.

Mr. FRANK.—Q. Mr. Moore, what is your business?

A. Vice-president of George A. Moore & Co.

(Testimony of Duval Moore.)

Q. What is the nature of the business that they are engaged in or were engaged in in the latter part of 1917?

A. General merchants, shipping and commission.

Q. Were you chatering vessels at that time for carrying merchandise for you? A. We were.

Q. Do you know the motor ship "Bayard"?

A. I do.

Q. And the owners named in here? A. I do.

Q. Did you have any negotitations with them just prior to November 3d with respect to the chartering of the motor ship "Bayard?"

A. I had chartered her for two trips previous to that, and I was trying to get her for a third trip, and had negotiated quite a bit with the owners.

Q. Now, you say you had chartered her for two trips. She had just returned from a trip for you?

A. Yes.

Q. And just finished discharging her cargo that afternoon on November 3d?

A. I could not be positive as to dates. I have not refreshed my mind on the matter at all.

Mr. FRANK.—Will you agree, Mr. Griffiths, that is what she had done? She had discharged her cargo that afternoon and had dropped out into the stream two hours before the collision. That I understand to be the fact.

Mr. GRIFFITHS.—If you say it is the fact, all right; I don't know.

Mr. FRANK.—Q. What, if any, offer did you

(Testimony of Duval Moore.)

make to them [18] at that time for the charter of the vessel, and for what voyage?

A. I offered them $400,000 for a round trip from San Francisco to two points in the Philippines and return to San Francisco.

Q. Two ports in the Philippines? A. Yes.

Q. State whether or not that offer was under consideration at the time the collision occurred?

A. I was told that they had to cable to Norway on it, and they were considering it, and I was told that I would have the first chance at the vessel.

Q. You were awaiting a reply from the owners at that time? A. I was.

Q. That was a voyage charter, was it?

A. A round trip charter.

Q. A voyage charter? A. Yes.

Mr. FRANK.—That is all.

Cross-examination.

Mr. GRIFFITHS.—Q. That is what you would call a lump-sum charter, was it not—a lump sum of $400,000? A. Yes.

Q. Now, that charter would have to be submitted to the United States Shipping Board for approval before the vessel could sail, would it not?

A. I believe that at that time, or sometime along about then, these charters had to be submitted to the United States Shipping Board.

Q. You contemplated that this charter would have to have the approval of the United States Shipping Board, did you not?

(Testimony of Duval Moore.)

A. Oh, yes. My offer was, of course, subject to approval of whatever authorities were necessary.

Q. Do you happen to know whether or not the shipping board at that time would approve a lump sum charter of any kind? A. I believe they would.

Mr. FRANK.—Oh, well, I object to that.

Mr. GRIFFITHS.—But you don't know?

A. I would like to [19] refresh my memory from someone who is in court, about dates. I want to ask Mr. Page if I did not charter the "Kina" after that.

Mr. GRIFFITHS.—Very well.

Mr. PAGE.—The 27th of November.

A. They would have approved lump-sum charters, because they did approve them afterwards.

Mr. GRIFFITHS.—Q. Was the "Kina" a lump-sum charter? A. Yes.

Q. Do you know the rates at which they were approving time charters?

A. No. As a matter of fact, we could not get definite information out of the shipping board; there were no rules at that time. They seemed to be pretty liberal at that time about approving charters.

Q. What is the dead weight tonnage of the "Bayard," do you know?

A. I could not tell you that.

Mr. GRIFFITHS.—What is it, Mr. Frank, will you tell me?

The WITNESS.—I know her cubic; that is what I was interested in.

(Testimony of Duval Moore.)

Mr. KUTTER.—5200 dead weight tonnage.

Mr. GRIFFITHS.—Is that agreed to?

Mr. FRANK.—About that.

Mr. GRIFFITHS.—Q. Didn't you know, Mr. Moore, before that vessel could sail under your charter, being a neutral vessel, you had to have a permit for bunkers from the War Trade Board?

A. Those questions had not become acute; we did not consider them in shipping; it was after that that most of these rules and regulations that I have run into were made.

Q. Do you think you could have got bunker fuel at that time without application to the War Trade Board?

A. I did not have any apprehension about that. We had gotten it before, and the question had not come up. I think there was no question but that the charter would have been approved. [20]

Q. How many days would that proposed trip have consumed, the round trip, to two ports in the Philippines and return to San Francisco?

A. I could not tell you definitely on that. I was not interested in the time element, seeing it was a lump sum; the captain could tell you better about that; she made a similar trip for me before, so you could take that as pretty close.

Q. How long did it take her on the previous trip?

A. I don't remember that; something under three months; quite a bit under three months.

Q. Under the terms of this proposed charter

(Testimony of Duval Moore.)

party, was the ship owner to pay all the expenses of loading and discharging? A. Yes.

Q. And crew? A. Yes.

Q. Port charges? A. Yes.

Q. Did you have a form of lump-sum charter before you when you were negotiating?

A. Oh, yes, we had the previous charter; it would have been similar to the previous charter.

Mr. GRIFFITHS.—Have you got that previous charter, Mr. Frank?

Mr. FRANK.—No, I have not.

Mr. GRIFFITHS.—Have you got it, Mr. Moore?

A. Not with me.

Q. I mean, can you get it? A. Yes.

Q. Can we have that this afternoon?

Mr. FRANK.—If we have it, you can have it.

Mr. GRIFFITHS.—That is all.

Testimony of Arthur Page, for Libelant.

ARTHUR PAGE, called for the libelant, sworn.

Mr. FRANK.—Q. Mr. Page, your business is that of a ship broker? A. Yes.

Q. You have been engaged in that business for a great many years here in San Francisco?

A. Yes.

Q. And during the period here in question, you have been constantly [21] engaged in chartering vessels? A. Yes.

Q. Out of the port of San Francisco, and for round voyages, etc.? A. Yes.

(Testimony of Arthur Page.)

Q. Now, there are different kinds of charters, are there not, Mr. Page? A. Yes, there are.

Q. There is what we call a time charter, so much per month? A. Yes.

Q. There is a lump-sum voyage charter?

A. Yes.

Q. And there is a measurement voyage charter, measuring the weight; that is so much per ton?

A. Delivered, yes.

Q. And those are three different modes of chartering and employing vessels out of the port?

A. Yes, those are the principal ones.

Q. Now, did you charter any vessels subsequent to November 3d, or about November 3d—during that period? This vessel was detained from November 3d to December 21. Did you charter any vessels out of this port during that period?

A. Yes.

Q. On what kinds of charters?

A. Lump sum, principally, and one on time charter.

Q. One on time charter? A. Yes.

Q. In your particular business—

A. I beg pardon, I did charter some per ton delivered.

Q. That was what I was going to ask you about. During that time, was there any interference on the part of the Government preventing chartering of vessels?

A. The first record I have on my books is November 27th.

(Testimony of Arthur Page.)

Q. November 27th? A. Yes.

Q. What was that?

A. The steamer "Peru" was the first charter in which we inserted the clause "this charter is subject to the approval of the Government of the United States or the United States Shipping Board." [22]

Q. That was when the Government began, according to your experience, to require charters to be submitted to them for their approval?

A. Yes.

Q. Were there any particular class of charters that would or would not be approved? A. No.

Q. There was no fixed rule about it even then?

A. No.

Q. It depended upon the discretion of the chartering board. A. Yes.

Q. And the particular necessities of the Government at that particular time. Is that right?

A. The way they wished the charter was put before the shipping board, and they simply approved or did not approve. It was the charter and owners who agreed on the mode of chartering.

Q. When was it that the Government first began making general rules with respect to the chartering of vessels out of this port?

A. My own experience is about November 26th or 27th, around there.

Q. That was one instance where they intimated their preference, but I mean now their having it upon a different basis. When did that first begin?

A. That I can't remember.

(Testimony of Arthur Page.)

Q. It was away past this period, was it not?

A. They made arbitrary rates from Manila over about that time.

Mr. GRIFFITHS.—Q. About what time?

A. About November or December.

Q. Early in November?

A. Along about the end of November or December.

Mr. FRANK.—Q. What were the going rates for voyage charters for a round trip from San Francisco to Manila and return that the Goverment had allowed after they began allowing it—at that time, what were the going rates?

A. The going rates I consider were $20 out and $50 back; $70 on the round trip.

Q. $70 on the round trip? A. Yes. [23]

Q. Upon what basis?

A. On the vessel's dead weight of cargo.

Q. Dead weight of cargo? A. Yes.

Q. Now, in a case where an owner discharged and put the vessel into berth himself for cargo, did the Government interfere in that at all?

A. No, I do not think so.

Q. Under those circumstances, was there any rate that the Government indicated, or could they get what was the going rate?

A. They could get the going rates. The berth rate was the last thing interfered with, and that was only lately.

Q. With reference to the demand for ships at that time, what have you to say?

A. There was a very strong demand.

(Testimony of Arthur Page.)

Q. With reference to the freight rates, why they were high, why they were going up or going down, what was the situation?

A. The freights, before they were interfered with, were very high, and they would very likely have gone higher.

Q. Would have gone higher? A. Yes.

Q. Of course the men who chartered the vessel, as, for instance, Mr. Moore, who put her on the berth, would make these rates. That was the fact, was it not? A. Yes.

Q. The charterers were doing that? A. Yes.

Q. And the Government was not interfering with the amount that they could receive?

A. On the berth, no.

Q. They were doing it for profit?

A. They were getting a profit at that time, yes.

Q. With reference to cargo demands at this time, looking for ships, was it very plentiful? Was there more cargo than ships could carry? A. Yes.

Q. Both ways? A. Yes.

Q. You handed me a list, Mr. Page, of ships that were chartered by you. Is it a list during this period? A. Yes.

Q. And which the Government approved?

A. When the time came [24] for approval, when the date was reached when they required approval, they are there marked.

Q. I am not interested in those that preceded it, but I notice here you have November 27th, December 7th, December 13th and December 27th, some

(Testimony of Arthur Page.)

vessels mentioned here. Just use that to refresh your recollection, Mr. Page. It is a memorandum made from your own books, is it?

A. Yes, from our charter book.

Q. That first one, November 27th, that was a lump-sum charter? A. A lump-sum charter.

Q. How much was the charter for?

A. $345,000.

Q. The size of the vessel?

A. 6,900 tons dead weight of cargo.

Q. What was the nature of the voyage?

A. From Hong Kong and or Manila to San Francisco.

Q. One way? A. One way.

Q. $345,000? A. Yes.

Q. That would amount to how much a ton?

A. $50 a ton.

Mr. GRIFFITHS.—May I interrupt just a minute: Is that a charter from the other side to here and back again?

A. No, just coming over.

Q. Coming over to here? A. Yes.

Mr. FRANK.—Q. That would amount, for a round trip, to about $690,000, would it not, assuming that the round trip was on the same basis?

A. About $450,000 or $460,000; that is, it is based on what I said before to you, of $70 for the round trip.

Q. You mean assuming that she would only get $20 going back? A. Yes.

The COURT.—Why the difference in rates?

(Testimony of Arthur Page.)

A. The call was tremendous from that side to here.

Q. More than from here there?

A. Yes, and therefore the Government allowed this rate to be paid. [25]

Mr. FRANK.—Q. What was the next one?

A. The next one was the Danish steamer "Kina," 8000 tons dead weight, $400,000 lump sum, Manila to San Francisco.

Q. Just one way? A. Yes.

Q. That was a lump-sum charter? A. Yes.

Q. What was the next one, and the date?

A. These two I mentioned were the 27th of November. The next one is the 7th of December, the Danish mother boat "Peru."

Q. What was the voyage?

A. She received, from two ports in the Philippines, to San Francisco, a lump sum of $500,000.

Q. What was her size?

A. She is 9,700 tons dead weight. This shows more than $50 a ton on 9700 tons, but because she loaded at two ports, the Government approved $15,000 more as a lump sum—because there were two ports of loading.

Q. And the other two are from here over?

A. The other two are from here over, and then we put in the charter right along "subject to approval."

Q. What date was that?

A. That was the 15th of December, the "Ataka

(Testimony of Arthur Page.)

Maru," $20 on the vessel's dead weight cargo capacity, per ton.

Q. What date is the next one?

A. The next one is December 27th. The "Ataka Maru" was from San Francisco to Yokohama and Kobe, $20 per ton on vessel's dead weight cargo.

Q. You say where she touched at two ports, the shipping committee were inclined to increase the amount of the charter hire?

A. Yes, they did; they allowed that.

Q. I understand you that previous to November 27th there was no interference at all?

A. As far as my knowledge goes.

Q. You are one of the largest chartering firms on the coast, are you not? A. Yes.

Q. Have been for years? A. Yes. [26]

Q. If anybody knew about it, you would be sure to know about it? A. Yes, I think so.

Mr. FRANK.—That is all.

Cross-examination.

Mr. GRIFFITHS.—May I look at that list, please?

A. Yes.

Q. Take November 27th. You refer to two vessels, Mr. Page. A. Yes.

Q. One was the Danish steamer "Transvaal" and the other the Danish steamer "Kina"? A. Yes.

Q. Those were both lump sum charters?

A. Yes.

Q. The voyage began in each case on the other side, did it not?

(Testimony of Arthur Page.)

A. They had gone from this side over.

Q. I mean, this charter was, according to your notes here, Danish steamer "Transvaal" 6900 tons, dead weight, $345,000, lump sum, Hong Kong and or Manila to San Francisco? A. Yes.

Q. Now, in the case of the Danish steamer "Kina" it was $400,000 lump sum Manila to San Francisco, was it not? A. Yes.

Q. Now, isn't it the fact that the Shipping Board might very well be interfering with a charter from this port out on a neutral vessel when it would not be interfering with a neutral vessel coming back to this country, which was the very thing that the Shipping Board desired?

Mr. FRANK.—That is a sort of question, if your Honor please—what the shipping board might or might not have done is scarcely up to this witness. That is an argument that you are suggesting now.

Mr. GRIFFITHS.—He is an expert on these lines. My point is that the very agreement that the people had to sign to get bunker coal is an agreement to return to this port, and why should they interfere with a vessel which is coming to this port?

Mr. FRANK.—But we went out again. [27]

The COURT.—If he knows whether the Shipping Board were making any distinction between vessels leaving here and vessels coming here he may state it.

A. From a certain date the charters from this side over had to be approved.

(Testimony of Arthur Page.)

Mr. GRIFFITHS.—Q. When did that date of approval of charters from this side begin?

A. I cannot tell you exactly. The shipping board ought to be able to tell you that; but my charters show you where I commenced. I have two charters there on the other side.

Q. Those had reference to the other side?

A. No.

The COURT.—No, two later charters.

Mr. GRIFFITHS.—On the next page?

The COURT.—Yes.

Mr. GRIFFITHS.—Q. Did you have any cases that would bring the question to an issue earlier than that?

A. No. The charters were made before those dates, there was nothing of that sort required.

Q. Have you got any charters that you can furnish us with of neutral vessels from San Francisco out prior to November 27th?

A. Yes, on top there.

The COURT.—If I get your suggestion, Mr. Griffiths, the requirements was that they go and return. I understand this was a charter to go and return.

Mr. GRIFFITHS.—Yes, to go and come back and discharge.

The COURT.—I understand that was the proposed charter in the present case, to go to Manila and come back, so that really does not make much difference, does it?

(Testimony of Arthur Page.)

Mr. GRIFFITHS.—Except this, if your Honor please, that I have been informed—and I am going to ask the privilege of taking the deposition of a member of the chartering committee— [28] the chartering committee had the approval of these, hadn't they, Mr. Page?

A. We had to telegraph to Washington.

Mr. GRIFFITHS.—I am advised that the chartering committee of the United States Shipping Board, and I think that the members of the committee will so testify, that they would not have approved any lump-sum charter between November 3d and December 21st, or before or after those dates, and I am somewhat puzzled by the testimony.

Mr. FRANK.—The best way to prove that is to show what they did on those dates. The records will show what they did. If there is any desire to take their testimony on that subject I am willing to join with you on it.

Mr. GRIFFITHS.—Yes, I want to do it.

Mr. FRANK.—We want the facts. What they would or would not have done in other instances is entirely immaterial. The question is what treatment we would have had at this port, and that is shown by what they did.

Mr. GRIFFITHS.—As to the vessels here, Mr. Page, prior to November 27th, are the dates those of the charters, or the dates of the commencement of the loading?

A. The date of the charter. I have taken them right from our books.

(Testimony of Arthur Page.)

Q. And it would be for immediate loading?

A. If you will name the ships I think I can tell you.

Q. Take the Danish steamer "Kina," the 4th of November, 1917—no, that is from the Philippines to San Francisco. That is the other way.

A. Yes.

Q. The first one here out of San Francisco is the Danish steamer "Arabien."

A. She was on the spot, the "Arabien." That is as far as my recollection goes. I can verify that from the charter, of course. [29]

Q. Wasn't the charter of the "Arabien" submitted to the Shipping Board and approved by it?

A. Not so far as I know.

Q. Would you know for certain whether it was?

A. I was away at the time. I had talks on the ship before, and although the negotiations were closed without me, I was to make out the charter as soon as I came up from the south.

Q. Who was she chartered to?

A. To the American-Asiatic Company.

Q. The "Dicto," on the 20th of November, Seattle to the Orient and return, via Panama Canal. That was a time charter? A. A time charter.

Q. And the rate I notice here is 45 shillings Sterling per ton total dead weight?

A. 45 shillings Sterling.

Q. Do you know whether that was submitted to the shipping board?

A. That was the first vessel which was ordered

(Testimony of Arthur Page.)

to, or was only allowed 45 shillings Sterling; she was getting more money before, and the Government interfered there and made her accept 45 shillings.

Q. Isn't it a fact that that is the highest amount allowed on time charters by the shipping board then and since then, 45 shillings, dead weight tonnage?

A. It has been lowered since then.

Q. To what? A. To 35 shillings.

Mr. FRANK.—That was confined to a time charter? A. Yes; just a few vessels.

Mr. GRIFFITHS.—Q. The last lump-sum charter prior to November that you have here is October 13, which is the American Auxiliary Steamer "Erris." Then you have no lump charter until November 27th. A. Yes.

Q. So there is nothing from your records here to indicate whether the shipping board was or was not requiring approval of lump sum charters as of November 3d, is there?

A. No, there is nothing there.

Q. Do you, as a matter of fact, know whether or not approval [30] would have been required for a lump-sum charter early in November?

A. No, I do not know.

Q. I mean from your experience.

A. No, I had no occasion to find out, not from my knowledge.

Q. Even this lump sum charter on the "Erris" of October 13th is on an American vessel, not a neutral vessel, at all? A. Yes.

Q. So the situation might be utterly different?

(Testimony of Arthur Page.)

A. Yes. I gave all the charters that we had in our books.

Q. In your whole list, you have not any Norwegian vessel prior to November, have you?

A. The "Dicto" is Norwegian.

Q. But that was a time charter? A. Yes.

Q. And it was at that 45 shilling rate, which was a rate that the shipping board allowed?

A. Yes.

Q. Do you know anything about the charter of the "Thordis," a lump sum charter, or proposed charter, for the trans-Pacific round trip of $120,000 a month?

A. Yes. I had nothing to do with it.

Q. Do you know that a charter was proposed on her on September 18, 1917?

A. No, I don't know the date.

Redirect Examination.

Mr. FRANK.—Q. Mr. Page, notwithstanding that you had no occasion to charter any vessels during the interim just inquired of you by Mr. Griffiths, in your business don't you keep in touch with all of the business that is going on in this port?

A. We try to, yes.

Q. Don't you keep in closer touch with the local shipping board, and find out their rules and regulations and what they are doing?

A. It is very hard to find out what they are. They won't give you anything in writing; it is very indefinite.

(Testimony of Arthur Page.)

Q. But such information as they had then, you kept in touch with it, did you not? A. Yes. [31]

Q. As I understand it, they themselves did not know what they were doing; their organization was imperfect and they were in no shape to handle business, really: Isn't that the fact?

A. Naturally, with the tremendous business that was thrown on their shoulders, and the difficulty they had with other owners and other Governments, it kept them in hot water all the time.

Q. They are just now really getting into shape: Isn't that the fact?

A. Since the end of last year, they have begun to get things down and make them arbitrary.

Q. Previous to that, if they did interfere, there was not any rule of action at all; in one case they might and in another case they might not?

A. We never knew from the shipping board here, for instance, what was really the requirements. We always had to telegraph to Washington, and when I say "we"—the shippers, like Mr. Moore, or the owner, would be the ones that would do the cabling; the brokers did not do it.

Q. But at any rate there was no fixed rule; sometimes they would do it and sometimes they would not?

A. No, not after they commenced; not after they gave the rate as $20 from and $50 back.

Q. Up to that time—that was subsequent to this period?

(Testimony of Arthur Page.)

A. Up to that time I don't think there was anything very definite.

Q. That was subsequent to this period when they began to make a regular rule, was it not?

A. About the 27th of November was when we commenced to find out definitely.

The COURT.—What charter was finally made of this vessel when she did come off the drydock?

Mr. FRANK.—When she did come off, she was then in the hands of the Government, and I don't know just what it was; I think it was 45 shillings. I think that is what it finally resulted in.

Mr. GRIFFITHS.—Not 45 shillings, was it? As a matter of [32] fact, you came off the dock on December 21st and did not sail till the middle of January. That is, your repairs were completed December 21.

Mr. FRANK.—Yes, I understand that. By that collision you disorganized the entire business; it very naturally followed.

Mr. GRIFFITHS.—Let us have this clearly understood: These approvals of charters were not done here by the local office of the shipping board at all, were they? A. No.

Q. So all the talk about the disorganization here had nothing to do with that feature of the situation?

A. No.

Q. The approval was submitted to the shipping board at Washington? A. Yes.

Q. It was approved there by the chartering committee, or disapproved? A. Yes.

(Testimony of Arthur Page.)

Q. And the local board here, as soon as there were fixed rules, they had the administration of them, did they not?

A. The approval always came from over there by telegraph.

Q. You could find out here what the fixed rules were when they were initiated, couldn't you?

A. I presume so, yes.

Q. That is all I am trying to get at. Didn't they simply refer you East if you made inquiries?

A. Unless they became known. We have cases in point now, where the rates are given on case oil to Manila and New Zealand and Australia; we can get those through Mr. Cook absolutely now. But three or four months ago we could not do it.

Q. They simply referred you East? A. Yes.

Q. So that the information as to what the rules were at that time would have to come from the headquarters of the shipping board? A. Yes.

Mr. FRANK.—Q. If there were any rules?

A. Yes.

Mr. GRIFFITHS.—They could tell you if there were any? [33]

A. The disposition of everything came from there.

Testimony of E. Bryn, for Libelant.

E. BRYN, called for the libelant, sworn.

Mr. FRANK.—Q. Captain, you are the master of the "Bayard"? A. Yes.

Q. And were at the time of the collision?

A. Yes.

(Testimony of E. Bryn.)

Q. You are familiar with this agreement that I read to the Court? A. Yes.

Q. Acted under it? A. Yes.

Q. And at that time you were representing the Respondents in this case?

A. Mr. Blackett and Mr. Evans.

Q. Were they present during the entire time of the repairs?

A. They were there all the time.

Q. Now, what, if anything, did you do with regard to consulting them as the repairs went along, as to the manner in which they should be made, the nature of the repairs, etc.?

A. I kept them fairly acquainted with the repairs as they were going on, and both of these men were down at the Union Iron Works, where they had their work at the same time in other ships as well, and they came down and looked at my ship once in a while.

Q. During that time, was any suggestion made by either of them that the repairs were not proceeding in the manner in which they desired or which was most beneficial to the parties?

A. No, there were no remarks made.

Q. So far as you were concerned, how were they proceeding with it—with diligence or otherwise?

A. Yes, we were going on as energetically as possible, and always working in conjunction with the "Beaver" people; they always had the say in the matter; we allowed them to go over there and

(Testimony of E. Bryn.)

check up everything, all of the amounts and everything. [34]

Q. In other words, you were proceeding upon the assumption that they were going to pay the bills and they should have the say as to how the repairs should be made? A. Yes.

Q. Subject, however, to the fact that she must be thoroughly repaired? A. Yes.

Q. When were the repairs completed?

A. I can't remember exactly; I think it was the 21st of December. I would not say the exact date, but I have an extract from the log that will show that.

Q. You gave me a memorandum signed here by yourself and the officers: Is that the proper date there? A. Yes, December 21, that is correct.

Q. The collision occurred on November 3d?

A. Yes.

The COURT.—Q. When were the repairs completed? A. December 21st.

Mr. FRANK.—Q. Now, during the time that these repairs were being made, did you retain your crew? A. Yes, we had to retain the crew.

Q. You say you had to retain them? A. Yes.

Q. How were they shipped originally?

A. Some of these men were shipped from home for a period of two years.

Q. Were any of them shipped otherwise?

A. Some of them were shipped to follow the vessel on the round trip.

Q. On which round trip?

(Testimony of E. Bryn.)

A. From the United States back to the United States.

Q. She had just completed one trip, had she not?

A. Yes.

Q. Were those retained?

A. Some of them were retained.

Q. They were retained? A. Yes.

Q. Why?

A. Because we must have skilled men on a ship of that class; we could not allow the Union Iron Works to have anything to do with our engines; because it was a special type of engines; it is a Diessel engine, and that engine is not well known in this country; we only allow our men to take it to pieces and put it back again. [35]

Q. Was there anything necessary to be done to ascertain whether or not the collision had effected the engines?

A. In our opinion there was, because the shock was so strong that one of the men who was aft was thrown out of his bunk at the time of the collision, and both the chief engineer and myself insisted upon having the engines thoroughly overhauled and opened up; so we had to go to that expense and do it.

Q. What was the nature of the injury that you apprehended from that shock?

A. Some cracks or something thrown out of place.

Mr. FRANK.—There is no question, Mr. Griffifths, but what the "Beaver" was going full speed up to just a few minutes before the collision?

(Testimony of E. Bryn.)

Mr. GRIFFITHS.—She was going full speed before—she was going against a strong ebb tide.

Mr. FRANK.—Going with it—that was the trouble.

Mr. GRIFFITHS.—I mean she backed out.

Mr. FRANK.—I simply want to get that it was a very severe concussion; it was a very severe blow.

Q. Now, subsequently, you made a trip with this vessel to Manila and back, did you not?

A. No; I took charge of the vessel on the first of November.

Q. I mean since the collision.

A. Since the collision I have made one voyage to Australia and back, to Sydney.

Q. What was the length of that voyage as compared with the voyage from here to Manila and back?

A. That Australian voyage should be longer than the Manila time.

Q. About how much longer?

A. About ten or twenty days longer.

Q. How long did it take you to make the voyage from here to Australia and back?

A. It took us about 101 days from the time we started to load—105 days from the time we started to load until we were discharged here.

Q. Until you were discharged here?

A. Yes; that is when the [36] voyage was completed.

Q. The round trip? A. The round trip, yes.

Q. How many ports did you make?

(Testimony of E. Bryn.)

A. We made two ports, Melbourne and Sydney.

Q. In your opinion, a trip from here to the Philippines, touching at two points, and return, would take how long?

A. About 80 or 85 days—between 80 and 90 days.

Q. What is the dead weight cargo capacity of the "Bayard"?

A. The dead weight capacity is 5200 tons, but I want to remark this vessel has got an exceedingly large cubic capacity, which, of course, would play a very important thing when the vessel is chartered, because we can carry such an amount of light cargo, much more than what the ordinary vessel does.

Q. Do you think that she would command a better rate than an ordinary vessel, based upon a dead weight cargo capacity? A. Yes.

The COURT.—For light cargo?

A. For light cargo; as Mr. Moore remarked, he was counting on the cubic capacity.

Q. What is the cost of running that vessel per day, that is for crew, fuel, stores and all the things that are necessary for the running of the vessel?

A. It is about $260 per day.

Q. $260 per day? A. Yes.

Q. That is outside—

A. That is what I pay out.

Q. That is what you pay? A. Yes.

Q. That is what it ran back and forth on this last trip, was it not?

A. Yes, outside of insurance, taxes, etc.

Q. Outside of any expense that might be neces-

(Testimony of E. Bryn.)

sary for the loading and discharging of cargo and port fees and such as that?

A. The actual running of the vessel—the actual running expense of the vessel.

Q. Are what? A. $260 per day.

Cross-examination.

Mr. GRIFFITHS.—Q. You say that does not include port charges?

A. No, that is just running the vessel while it is going. [37]

Q. Does it include the expense of loading and discharging the cargo?

A. No; I can't count those in because they are more or less different; it depends on the voyage.

Mr. FRANK.—We will give you those.

Mr. GRIFFITHS.—We will have to get the cost of those.

Mr. FRANK.—We will give you those.

Mr. GRIFFITHS.—Q. Captain, you have just returned, as you say, from a voyage to Australia?

A. Yes.

Q. Under charter to whom?

A. Well, I have been on two voyages; the one you are referring to now, the Australian voyage, was made just after we were repaired. I have been on a voyage in the meantime—that was McNear & Co. that we were chartered to.

Q. Was that the voyage immediately succeeding the accident? A. Yes.

Q. What was the rate there? Was it a time charter you were under?

(Testimony of E. Bryn.)

A. It was a time charter, yes; it was at the prevailing Government rate at the time.

Q. That charter was approved by the shipping board, was it not? A. Yes.

Q. Do you know what the rate was?

A. I don't remember that, exactly.

Mr. FRANK.—We will give you that.

A. You can get it from the charter party.

Mr. FRANK.—We do not consider that material, but you can have that if you want it.

Mr. GRIFFITHS.—Q. Before you sailed you had to have a permit for bunkers, didn't you?

A. Yes. All those things are outside of my jurisdiction. What I do is navigate the vessel, and I get all those papers submitted to me, and I have nothing to do with that.

Q. Didn't you sign the agreement yourself, sign an agreement before you left this port with that vessel, to return to San Francisco and discharge all of her cargo here before you were able [38] to get your bunkers? A. I signed one on leaving.

Q. You signed one on leaving?

A. When the ship sails I sign an agreement, whatever the agreement is.

Mr. FRANK.—What has that to do with this case? The date of that is away in January.

Mr. GRIFFITHS.—That does not make any difference. I will connect it up when I get the testimony of the War Trade Board here.

Q. Did you on November 3d have a bunker permit outstanding from the War Trade Board?

(Testimony of E. Bryn.)

A. On November 3d I was not ready to sail.

Q. I am asking you whether you did have a permit?

A. I don't know what the ship might have had; I could not tell you that.

Q. So far as you know you did not?

A. So far as I know I had no occasion to find out, because the time I find out is the same day the ship leaves; then I sign for the permit, when I have got the stores on board.

Q. Do you remember the date that you signed the agreement that I refer to?

A. That was on the day we sailed from San Francisco, here.

Q. Was it January 12th.

A. I will tell you in a minute. I should think it would have been on January 17th, about.

Q. You can get the accurate date this afternoon. At any rate, the first agreement that you signed after November 3d was in January? No doubt about that? You did not sign any agreement prior to that time, prior to January, did you?

A. No, I didn't propose to sign any paper before that.

Q. When did you get authority from the owners of the "Bayard" to sign that agreement?

A. I didn't get any authority like that; when I came down to the custom house to clear the vessel, all those papers are brought before me and I sign them.

(Testimony of E. Bryn.)

Q. Do you mean to say that you would sign an agreement with the understanding that the "Bayard" would, if granted bunkers, return to the port of San Francisco and here discharge all her cargo, without having authority from the Norwegian owners of the "Bayard" [39] to sign the agreement?

A. No, I don't mean to say any such thing, but I have got nothing to do with those matters.

Q. You say that you signed that agreement?

A. Yes; when the ship sails I go to the custom house and all these papers are placed before me and I sign them, but it is not up to me to find out whether they are or not. That is for others to do that work.

Q. Let me understand: You did not have any authority from your owners, express authority, to sign that agreement, then, did you?

A. Such a thing never occurred; I never got such authority; I had nothing to do with it.

Mr. FRANK.—The owners would not authorize the ship to go out unless she complied with the Government requirements.

The COURT.—I understand the charter required that, to go and return.

Mr. GRIFFITHS.—But, if your Honor please, the War Trade Board would not on November 3d grant bunkers—and by "bunkers" I mean oil and supplies—without an absolute guarantee, and furthermore without a showing that the party who signed the agreement had authority to sign it, because what they wanted to be sure of was that the

(Testimony of E. Bryn.)

ship would return, and they were not satisfied to take the word of anybody who was not authorized to sign.

Mr. FRANK.—How does that affect the issue here?

The COURT.—What I am trying to suggest is that where a charter requires that the vessel go from San Francisco to Australia and return, that seems to be sufficient authority from the owners to warrant the captain saying that he would fulfill the charter, that he would go there and come back.

Mr. GRIFFITHS.—As a matter of fact, the War Trade Board, your Honor, insisted with respect to this very vessel, on a cable direct from Norway, as to her present voyage, before she could get bunkers.

Mr. FRANK.—How would that affect this question here? This is bringing into the case immaterial matters. [40]

Mr. GRIFFITHS.—I don't think it is immaterial at all. The War Trade Board has to be satisfied when you submit your charter—

Mr. FRANK.—Very well, go on and submit your case in your own way. I am simply giving my own view instead of objecting directly to the introduction of the testimony.

Mr GRIFFITHS.—But you started the discussion. Let me present my view of it.

Q. Now, Captain, the agreement to which I have referred was signed by yourself and by somebody else. That was Mr. F. W. Keith? Who is agent for your vessel here?

(Testimony of E. Bryn.)

A. Captain Olson, at the present time.

Q. Who was the agent of your vessel here on January 7th? A. The Norway–Pacific Line.

Q. Do you know who the secretary of that line was? A. Mr. Kutter.

Q. On January 7th? A. Yes.

Q. Do you remember who signed that agreement with you?

A. Nobody signed it with me. This thing is a formality that we do down at the custom house when the ship leaves; we go down there and put our name on the papers.

Q. You are talking about the manifest?

A. No, I am talking about those papers.

Q. I am talking about the agreement with the War Trade Board.

A. I am talking about that—all those papers down here.

Q. You don't remember who signed it with you?

A. I don't remember who signed it with me.

Q. As a matter of fact, it was signed by Mr. F. W. Keith, secretary of the Norway–Pacific Line, was it not?

Mr. FRANK.—Let him look at it. It might have been the custom house man.

A. Are you sure those papers concern me at all?

Mr. GRIFFITHS.—It bears your signature.

A. Yes. [41]

Q. It is an agreement to return to port. Did you sign that agreement? A. Yes.

(A recess was here taken until two thirty P. M.)

AFTERNOON SESSION.

Mr. GRIFFITHS.—Q. If your Honor please, Mr. Frank's witness has not come, and I can put a witness on out of order.

The COURT.—Very well.

Testimony of Isaac H. Cory, for Respondent.

ISAAC H. CORY, called for the respondent, sworn.

Mr. GRIFFITHS.—Q. What is your address, Mr. Cory? A. Residence?

Q. No, your business address?

A. Custom house.

Q. You are connected with the local office of the War Trade Board, are you not? A. Yes.

Q. In what capacity? A. Assistant agent.

Q. The activities of the War Trade Board include, do they not, what is called the Bureau of Transportation?

A. That is a branch of the War Trade Board.

Q. Have you any special connection with the Bureau of Transportation, and if so what?

A. I handle all matters pertaining to transportation.

Q. What, describing them briefly, are the functions of the Bureau of Transportation of the War Trade Board?

A. The functions are to license, to control operation of the vessels, of all vessels of any country going out of the port, of any port in the United States, going foreign, in such a way as to regulate

(Testimony of Isaac H. Cory.)

the use of them to the best advantage of the United States during the war.

Q. Does that Bureau and this local office of the War Trade Board, have control of bunkers?

A. Yes.

Q. What do you mean by "bunkers" as used in that sense? [42]

A. Bunkers, as used in the sense of the Bureau of Transportation, are regarded in a different light than they are as regards the custom house. We consider bunkers not only the fuel oil, or the fuel coal which is the customs definition of bunkers, but we go further and consider also any stores such as food stuffs, engineering stores, or anything else in the line of supplies taken on board the steamer.

Q. What is necessary in order that neutral vessels may get bunkers? Just describe what the procedure is?

Mr. FRANK.—One moment. I want to offer in objection or suggestion, whatever you may consider it, that the question be made to apply to the time here in question.

Mr. GRIFFITHS.—I was coming to that. I wanted to lay out the general procedure and then have Mr. Cory confine it to November 3d, 1917; I will put it this way: Was it necessary on November 3, 1917, that a neutral vessel, a Norwegian neutral vessel, should have a permit from the War Trade Board in order to get bunkers?

A. Yes.

(Testimony of Isaac H. Cory.)

Q. How would that permit be secured?

A. Usually the broker that handles the vessel files a formal application with the War Trade Board or the branch—that is usually filed at the branch office, but in some cases it is filed by the owners in Washington and New York, and the branch office is advised accordingly to issue the license, or withhold the license, depending upon whether or not the application is approved or disapproved.

Q. Would an agreement be exacted from the owners, or their representatives, in order to secure bunkers after the application?

A. Several agreements would be exacted.

Q. Several agreements would be exacted?

A. Yes.

Q. Then would a permit issue if the application were approved?

A. The permit would be issued on authority from Washington; if the War Trade Board or Bureau of Transportation in Washington approved the application and they were furnished with the fact, and when they knew that the agreements had been executed, they would grant the license. [43]

Q. When that agreement was presented to you, would you require being satisfied that the parties signing the agreement had authority from the owners of the vessel to sign?

A. At that time we did not require them to present proof that they were authorized to sign. At

(Testimony of Isaac H. Cory.)

that time, if I was satisfied myself that the agent or the captain had sufficient authority to represent his owner along these lines—it was a very drastic agreement—I would grant him the license on the strength of him signing the affidavit.

Q. You would require to be satisfied that he did have authority to sign the affidavit, though?

A. Yes; in all cases, so far as I have found, they had sufficient authority.

Q. Have you made search of the records of the local office of the War Trade Board with reference to the Norwegian motorship "Bayard"?

A. Yes.

Q. Did the "Bayard" have outstanding on November 3d, a permit for bunkers—November 3, 1917? A. No.

Q. When, for the first time, after November 3d, 1917, do your records disclose an application for bunkers on behalf of the "Bayard"?

A. I have a copy of the license of the "Bayard" here. This will give the date of the license.

Q. Have you got, first, the date of the application? Have you got the application?

A. Here is the application with a copy of the license appended. It is dated January 14.

Q. Which is January 14—the permit or the application?

A. Of the application, the original application, we have no record other than this one here, which is signed dated January 7—the application; in

(Testimony of Isaac H. Cory.)

other words, the Norway–Pacific Line signed an application for bunkers, fuel on January 7, 1918. They were requested to furnish certain affidavits, certain agreements, rather, which they furnished here on January 12, five days later, and a license was issued on January 14.

Q. Now, by whom is the agreement signed? [44] A. It is signed by the master, E. Bryn, and it is also further signed by the Norway–Pacific Line Agency, by F. W. Kutter, I think it is, Secretary; signed as agent and sworn to before a Notary Public.

Q. And then you have a permit following?

A. There is a copy of the license.

Q. Of the license?

A. The original license is in Washington. This is our office copy.

Q. That is what date?

A. January 14th, the date of the license. This is the license for the stores. At that time we issued two licenses, one for the fuel and one for the food stuff.

The COURT.—May I inquire, do you have to await the arrival of these papers by mail, or do you get telegraphic advices that they will be along later?

A. These are our office copies; we make a triplicate set; one copy of the license is given to the master of the vessel, one sent to Washington, and one sent to our files.

(Testimony of Isaac H. Cory.)

Q. They are issued here?

A. Yes, on telegraphic directions.

Q. On telegraphic directions?

A. In that particular case. There are some cases that we issued without that.

Mr. GRIFFITHS.—This agreement, if your Honor please, refers to a telegram. It says, "Complying with telegraphic directions," something to that effect—which would come from the War Trade Board, Mr. Cory? A. Yes.

Q. Have you also searched your records with reference to the Norwegian motor ship "Brazil"?

A. Yes. I have the records here in the same way that I have of the other.

Mr. FRANK.—What has that got to do with this case?

Mr. GRIFFITHS.—I have to put my case in out of order. The "Brazil" is owned by the same company as the "Bayard," and the dates of the applications are identical.

Mr. FRANK.—I do not see how that cuts any figure here.

Mr. GRIFFITHS.—I think it will develop that the owners of this vessel did not give authority for the signing of these agreements before January 7th. I want this date to go in [45] evidence.

Mr. FRANK.—You mean that if there had been an application made early in November, that they would not have given authority for that at that time? There is no evidence that they could not

(Testimony of Isaac H. Cory.)

have had the authority at any time that they wanted it.

Mr. GRIFFITHS.—I will connect it up by showing that they did not have authority until January 7th. I would like to put this in.

Mr. FRANK.—Subject to my objection, it is immaterial.

Mr. GRIFFITHS.—If it is immaterial, the Court won't consider it, but the identity of dates here is a significant fact.

Q. Mr. Cory, have you examined the custom-house records to see on what dates the "Brazil"—

Mr. FRANK.—Mr. Kutter tells me the "Brazil" is owned by a different company, not by the same owner.

Mr. GRIFFITHS.—I have admitted the "Bayard" was owned by a Aktieselskapet Bonheur on your statement that that is the representation in Lloyds. Lloyds shows the "Brazil" is owned by the same owners, and it is represented by Fred Olson & Company, the same managing owners: Aren't you also agent for the "Brazil," Mr. Kutter?

Mr. KUTTER.—We are the agents.

Mr. GRIFFITHS.—Isn't she owned also by the Aktieselskapet Bonheur?

Mr. KUTTER.—No.

Mr. GRIFFITHS:—You will have to clear up the ownership, Mr. Frank. I have admitted on your representation that Lloyds should govern as

(Testimony of Isaac H. Cory.)

to what the ownership is. I have it that both of these vessels are listed under Aktieselskapet Bonheur.

Mr. FRANK.—The only purpose of the admission, so far as that is concerned, was to get rid of proof of the incorporation of the plaintiff. Now, the fact that you have looked in Lloyds as to the ownership of the "Brazil" does not have anything to do with this [46] proposition. If it is owned by the same parties, I am perfectly willing to admit it, but I have nothing to verify that now.

Mr. GRIFFITHS.—Let us take it subject to that proof, that it is owned by the same parties, because I hoped to examine Mr. Kutter about it first.

Mr. FRANK.—That is all right. I simply want to make the suggestion that if it is owned by the same corporation, I am perfectly willing to admit it, but our information is now it is not.

Mr. GRIFFITHS.—May I proceed with that understanding?

Mr. FRANK.—Go on.

Mr. GRIFFITHS.—What date did the "Brazil" enter here?

A. I am not sure, but I believe it was November 13th; it is a matter of customs records, however, it can be very easily ascertained.

Mr. GRIFFITHS.—I will examine the custom-house records and ascertain if they show that.

Mr. FRANK.—All right.

(Testimony of Isaac H. Cory.)

Mr. GRIFFITHS.—Q. Did the "Brazil" have an outstanding permit for bunkers as of date November 13th? A. No, I do not think she did.

Q. When was her application for bunkers made?

A. The "Brazil's" application was made at the same time that the "Bayard's" was, the same day.

Q. That was January 7th?

A. I think the agreement was signed two days later.

Q. Have you got the actual application and the agreement there? A. Yes, I have it here.

Q. Will you give me the date of the application and the date of the agreement?

A. The application date is January 7th and the agreement was signed on the 14th of January, and the license issued the same day.

Q. By whom was the agreement signed there?

A. It was signed by August Larsen, Master, and also Mr. Kutter as agent, secretary [47] for the Norway-Pacific Line.

Q. That is in each case, then, as I understand it, there is the signature by the master, and then by Mr. Kutter, the secretary of the Norway-Pacific Line?

A. That is for the "Brazil" you are asking?

Q. Yes. A. Yes.

Q. Then, Mr. Corey, it is true, is it not, that at no time between November 3d, 1917 and January 14, 1918, was the "Bayard," so far as your records, free to sail from this port?

(Testimony of Isaac H. Cory.)

A. My records do not disclose anything prior to this application, January 7th.

Q. There is no outstanding permit to leave during that time? A. No.

Q. She could not have got away?

A. Not to my knowledge, and not as far as my records show.

Q. Is it your understanding that the Norwegian vessels, generally, were held up in this port during November?

Mr. FRANK.—I object to what his understanding was. I don't see how that can be competent.

The COURT.—If he could show that all Norwegian vessels were held up it would amount to the same thing.

Mr. FRANK.—I know that there was one held up for a particular and peculiar reason; I know all about it.

Mr. FRANK.—There were a great many on Puget Sound.

Mr. GRIFFITHS.—What I am getting at is that this gentleman has testified that there were negotiations going on in Washington, and I am going to cite the deposition of the War Trade Board as to the details of that.

Mr. FRANK.—We will come to that later.

The COURT.—He can testify, if he knows it to be a fact, that all Norwegian vessels were held up during that period. Of course, if that were true it would include this particular vessel.

(Testimony of Isaac H. Cory.)

Mr. GRIFFITHS.—Isn't it your understanding that all of the Norwegian vessels were held up during that time? [48]

Mr. FRANK.—I object to that mode of putting the question; his understanding is one thing, and the fact is another thing.

The COURT.—Yes, does he know the fact.

Mr. GRIFFITHS.—Q. Were they held up?

A. Well, I would not specify all Norwegian vessels; I will say all neutral vessels were held up pending an understanding that the vessels would return to the United States for discharge of their return cargo in consideration of the United States granting them the necessary fuel and stores to proceed on their business.

The COURT.—If they made that agreement?

A. If they made that agreement, they were permitted to go.

Mr. GRIFFITHS.—Q. You had to be satisfied at the time that the parties purporting to sign the agreement had authority to sign it?

A. Yes; of course, I used my discretion at that time. At the present time I do not. I require a direct cable from the owners in Norway.

Q. As a matter of fact, you had a direct cable from the owners of the "Bayard" in Norway for the present voyage? A. Yes.

Mr. GRIFFITHS.—That is all.

Cross-examination.

Mr. FRANK.—Q. Then as I understand it, Mr.

(Testimony of Isaac H. Cory.)

Corey, all that was required at that time was that the voyage should be a voyage from San Francisco, Pacific Coast Ports, as it is here, foreign and return, and if that was agreed upon that was the end of the prohibition. There was no more holding up under any circumstances?

A. There was no holding up except pending an agreement between the vessel and the United States Government.

Q. And that agreement was signed as these agreements are signed: Is that it? A. Yes.

Q. That is, a man came and made an application for bunkers; when he made application for the bunkers, you said "Well, sign this agreement, that this return voyage will be to an American port," [49] and he says, "Very well, I will," and he was then granted a license as a matter of course?

A. No, the fact that that agreement was signed was not necessarily an agreement that he would get a license. If the shipping board or chartering committee did not approve that voyage, or if the War Trade Board did not approve the voyage, did not approve the character of the return cargo, he did not get it.

Q. I understand; those are matters outside of your official duties. This was what you were attending to, was it not?

A. I always had these signed on instructions from Washington before we let the boat go.

Q. The considerations which were moving the War Trade Board in Washington or the Chartering

(Testimony of Isaac H. Cory.)

Committee in New York to refuse to let a vessel go out were matters within their discretion and varying in each instance, according to the circumstances: Is that right? A. Usually.

Q. Because one vessel was held up, you could not say whether another one would be; it would depend entirely upon circumstances attaching to that particular vessel and voyage: Is that right? A. Yes.

Q. Whether that was so on November 3d, do you know?

A. That has always been so since October 1st, at any rate; possibly earlier.

Q. What is that?

A. Within my knowledge, I would say up to October 1st.

Q. When was the charter board organized, do you know? A. The War Trade Board?

Q. No, the charter boards.

A. The charter committee has nothing to do with the War Trade Board.

Q. You spoke of them.

A. They are advisory.

Q. When were they organized?

A. I don't know.

Q. Then it is your opinion that the charter committee is advisory to the War Trade Board?

A. Only as regards the destination, the routing of the vessel. [50]

The COURT.—Q. The scheme that you speak of was in effect as early as October 1?

A. Yes; it was more or less disorganized up until

(Testimony of Isaac H. Cory.)

the 15th of January, when we had regular printed forms, and we began to use our judgment as well as possible before that.

Mr. FRANK.—Q. There were no considerable vessels held up before you had got into good shape in January?

A. Only the neutral vessels, practically.

Q. So far as the neutral vessels were concerned, as far as your experience was, there were none of them held up when they made agreements to go out and come back to the United States. That was the condition? A. Yes.

Q. Now, the "Bayard" made two previous voyages. She just returned from a voyage. Do you remember that? A. Yes.

Q. Did she get her bunkers and permit?

A. Not as far as my records show. It may be that she sail—did she sail from this port?

Q. She sailed from this port.

A. She may have got a permit through the collector of customs at that time; he was handling that matter before the War Trade Board was fully organized, as the only records that would show that would be at Washington.

Q. Now, as a rule, these applications are not made a long time ahead—when they are loading or getting ready to sail, they come in and make application? It is a matter of a very short piece of business to do it, isn't it?

A. It depends on what you call a short piece. Would you consider a week short?

(Testimony of Isaac H. Cory.)

Q. Say a week.

A. I would say that the matter could easily be disposed of in a week.

Q. So there was no occasion in November for these people to make application for bunker coal for a voyage to be begun on January 14?

A. No, not necessarily.

Mr. FRANK.—Where is the application in this case that was signed?

Mr. GRIFFITHS.—You mean the agreement? [51]

Mr. FRANK.—The agreement.

Mr. GRIFFITHS.—It is attached to the blue slip.

A. The agreement is attached to the other one.

Mr. FRANK.—I think he will read this into the record. I do not presume that he can leave these here. The application is "San Francisco, California, January 12, 1918. Hon. Collector of Customs, District and Port of San Francisco. Sir: Complying with requirement in telegram from the Bureau of Transportation, War Trade Board, allowing the Nor. M–S. "Bayard" 650 Tons=4550 barrels=191,100 Gallons of bunker oil, for voyage from San Francisco to Sydney & Melbourne and return, we hereby guarantee that this vessel, the Nor. M/S Bayard will proceed from San Francisco to Sydney & Melbourne and after taking on cargo will return directly to the United States, and that

its entire cargo shall be discharged at a port or ports of the United States.

E. BRYN, Master Nor M/S "Bayard,"
NORWAY PACIFIC LINE AGENCY,
F. WM. KUTTER, Secty.,
Agents Nor. M/S Bayard.

Sworn to before me this 12th day of January, 1918.

[Seal] M. J. LAWRENCE,
Notary Public."

Mr. GRIFFITHS.—Mr. Frank, will you let me interrupt you? Perhaps it will be in the interest of saving time, while Mr. Cory wants these records back, he will leave them here long enough to be copied.

Mr. FRANK.—I just want to read what I deem material. This has one specification in print, "Goods will be ready for shipment." This "will be" is stricken out.

The WITNESS.—That was an old application form that we used at the time for regular export licenses. [52]

Mr. FRANK.—That is stricken out and it says "Goods ready for shipment." I want to indicate that the application was made after the goods were ready for shipment. If they are going to be copies in, we will offer them in evidence in that shape.

Mr. GRIFFITHS.—There are four groups here. There is a group of documents that has reference to the "Bayard's" bunkers, strictly speaking, fuel, and then there is a group of documents relative to

stores on the "Bayard," and then there is bunkers on the "Brazil" and stores on the "Brazil." The copies may be marked Exhibits "A," "B," "C" and "D," and then we will return the original.

(The documents are as follows:)

Exhibit "A."

San Francisco, California, Jan. 12, 1918.

Hon. Collector of Customs,

District and Port of San Francisco,

Sir:

Complying with requirements in telegram from the Bureau of Transportation, War Trade Board, allowing the Nor. M/S Bayard 650 Tons=4550 barrels=191,100 Gallons of bunker oil, for voyage, from San Francisco to Sydney & Melbourne, and return, and hereby guarantee that this vessel, the Nor M/S "Bayard" will proceed from San Francisco to Sydney & Melbourne and after taking on cargo will return directly to the United States, and that its entire cargo shall be discharged at a port or ports of the United States.

E. BRYN, Master Nor. M/S "Bayard."

NORWAY PACIFIC LINE AGENCY,

F. W. M. KUTTER, Secty.,

Agents Nor. M/S Bayard.

Sworn to before me, this 12th day of January, 1918.

[Seal] M. J. LAWRENCE,

Notary Public. [53]

Application Form A–2.

Form E. A. B. 49.
Exports Administrative Board
Bureau of Export Licenses.
1435 K Street NW.
Washington.

App. No. ————————
Disposition ————————
Date ————————
Drawn by ————————
Checked by ————————
License No. ————————
Expiration date ————

(Space above this line for official use only.)

Instructions on the back of this sheet should be carefully read before this application is filled in. Answers must be written legibly or typewritten, if possible.

APPLICATION FOR ORDINARY BUNKER LICENSE.

Applicant's Reference No——.

Date Jan. 7, 1918, 191—

Bureau of Export Licenses,
1435 K Street NW., Washington, D. C.

I hereby apply for license to export (1) 650 Tons (Quantity)
We
of (2) Fuel Oil (Goods) Valued at (3) $—— to (4) Nor. M/S. "Bayard" at (5) San Francisco (Address) (6) Goods ~~will be~~ ready for shipment ———— (7) If the goods

are to be re-exported, state to what country ———— Voyage—San Francisco to Sydney & Melbourne, Aus. and return to San Francisco.

(Signed) NORWAY PACIFIC LINE,
By
Davison,

(8) Applicant's address 433 California St., San Francisco.

(9) License to be sent to P. W. Bellingall, Custom House Broker. 409 Washington St. (10) San Francisco.

(Over.)

Please read carefully before filling in application. This will avoid delay.

(a) A separate application must be made for each country of destination.

(b) A separate application must be made for each commodity. [54]

If goods covered by a license are to be shipped in more than one consignment the shipper may use form entitled "Certificate for Partial Shipment against Export License."

(c) To avoid delays, applicants are requested, in case of further communication, to refer to their own reference number and date as well as to the reference number of the Bureau of Export Licenses, if known, and to refer to each application in a separate letter.

(d) The statement in regard to the quantity should be made in definite units of net weight or measure, such as tons (of 2240 pounds each),

pounds, bushels, gallons, etc., and not in such terms as boxes, cases, sacks, etc. Measurement must be in tons of 40 cubic feet or fraction thereof. Measurement must not be given in the case of goods which are by custom shipped on a weight basis. Description of goods must include number of packages and contents of each. Values must be in dollars.

(e) Responsibility of exporter. Failure on the part of the applicant to take reasonable precaution as to the distribution of goods or the granting of an export license based upon the statements contained in this application, will not relieve the consignor from any responsibility to which he may be liable for affording aid or comfort to the enemy.

(f) Applicants are advised, if possible, to send in their applications at least two weeks in advance of the proposed date of ocean shipment, or as much earlier as possible. Export licenses, however, will not be issued more than 60 days before the proposed date of ocean shipment. Ocean bills of lading must bear date earlier than the expiration date shown on the license. If a license expires before a shipment is made and a renewal is desired, the original and duplicate copy of the original license must be returned with an Application Form E, entitled "Application for Renewal of Export License." Original and/or renewal applications will be considered in the order received. [55]

(g) When filled in and signed send this application to the Bureau of Export Licenses, 1435 K

Street NW., Washington, D. C., or to any branch of that bureau.

(h) Copies of all forms may be secured from the Bureau of Export Licenses, 1435 K Street NW., Washington, D. C., or from branch office of that bureau at No. 11 Broadway, New York, or from any branch of that bureau.

War Trade Board.

Exports Administration Board,

1435 K Street, Washington, D. C.

License No. Jan. 14 8

Date Mar. 13 8

Expires 191—

Applicant's No. EMD

UNITED STATES OF AMERICA

BUNKER LICENSE.

Permission is hereby granted Norway Pacific Line, 433 California St., San Francisco, Cal., to export 650 tons, of Fuel Oil, of Nor. Motor Ship "Bayard." Total value $—— from the United States to Sydney & Melbourne, Aust. at —— by any vessel flying —— flag.

This license is issued on the basis of the statements made in your application, and is subject to the rules and regulations which have been, or which may be hereafter, issued by the Exports Administrative Board.

The above license number must appear on the export bill of lading and export declaration.

EXPORTS ADMINISTRATIVE BOARD.

VANCE C. McCORMICK,

Chairman.

Countersigned:

C. A. RICHARDS,
Director of Bureau of Export Trans.
By ————————.

Original and Duplicant sent to (Applicant
Forwarding
Agent

This license Not Valid Unless Countersigned And Impressed With The Seal Of The Exports Administrative Board.

This License is Revocable.

Shipped Complete ——, 191—.

War Trade Board. Form E A B 14 [56]

Exhibit "B."

(Letter-head Norway-Pacific Line.)

San Francisco, November 28, 1917.

Collector of Customs,
San Francisco, Cal.

Sir:

Application is respectfully made for license for ships stores as per attached list "for use while in port" on the following steamers:

Name of Vessel—Norwegian Motor Ship "Bayard"
Name of Destination—Laid up San Francisco Bay
Probable duration of voyage—Laid up San Francisco Bay.
Number of Crew ..... About 26
Place where stores are to be delivered—Union Iron Works.

Respectfully,
NORWAY PACIFIC LINE AGENCY,
By F. Wm. Kutter,
Secretary.

(Bill-head Foard-Barstow Ship Chandlery Co.)

San Francisco, Cal., November 28, 1917.

List of Stores for Norwegian M/S "Bayard."

60 lbs. Wire Nails.

(Rubber Stamp:) Export license is hereby granted for all articles contained in shipment requiring a license, provided the same are exported on or before ——, 19—.

EXPORTS ADMINISTRATIVE BOARD.

C. A. RICHARDS,

Director of Bureau of Export Licenses.

By C. O. G. Miller. [57]

(Letter-head Norway-Pacific Line)

San Francisco, December 10, 1917.

Collector of Customs,

San Francisco, Cal.

Sir:

Application is respectfully made for license for Ship Stores as per attached list for the following Steamer:

Name of Vessel ..... Norwegian M/S "Bayard"

Port of Destination ....(Laid up in Port

(for Repairs

Number of Crew ..... About 29 Men

(Place where stores are to be

(delivered ..... Union Iron Works

Respectfully,

NORWAY PACIFIC LINE AGENCY.

By F. Wm. Kutter,

Secretary.

(Bill-head Foard-Barstow Ship Chandlery Co.)

San Francisco, Cal., December 10, 1917.

List of Stores for Norw. Str. "Bayard."

20 gals. Kerosine Oil.

1 Walkers Log, complete.

(Rubber Stamp:) Export License is hereby granted for all articles contained in shipment requiring a license, provided the same are exported on or before ——, 19—.

EXPORTS ADMINISTRATIVE BOARD.

C. A. RICHARDS.

I. H. Cory. [58]

War Trade Board.
Exports Administrative Board.
1435 K Street Washington, D. C.

License No. 612600.
Date Jan. 14, 1918.
Expires Mar. 15, 1918.
Applicant's No. EMD. 191—.

UNITED STATES OF AMERICA.
SHIP'S STORES LICENSE.

Permission is hereby granted P. W. Bellingall, of 409 Washington St., San Francisco, Cal. to export As per attached list of Ship's Stores Nor. M. S. "Bayard" total value, $—— from the United States to Australia and back to San Francisco, at —— by any vessel flying —— flag.

This license is issued on the basis of the statements made in your application, and is subject to the rules and regulations which have been, or which may be hereafter, issued by the Exports Administrative Board.

The above license number must appear on the export bill of lading and export declaration.

EXPORTS ADMINISTRATIVE BOARD.
VANCE C. McCORMICK,
Chairman.

Countersigned: C. A. RICHARDS,
Director of Bureau of Export Licenses,

_____,

Original and Duplicate sent to (Applicant
(Forwarding
Agent.

This License Not Valid Unless Countersigned and Impressed With The Seal of The Exports Administrative Board.

This License is Revocable.

Shipped Complete —— 191—.

War Trade Board.

612600.

Form E. A. B. 14. [59]

Port of San Francisco, January 12th, 1918.

I, Erling Bryn, Master of the Norwegian Motor-Ship "Bayard," do solemnly swear that the ship's stores permitted to be laden on board said vessel, shall not be transferred at sea to any vessel nor landed at any foreign port.

E. BRYN,
Master.

Subscribed and sworn to before me, this 12th day of January, 1918.

[Seal] M. J. LAWRENCE,
Notary Public.

Form E. A. B. 49. Application Form A–2.

Exports Administrative Board.
Bureau of Export Licenses
1435 K Street NW.
Washington.

App. No.....
Disposition .....
Date. .....
Drawn by..... ...
Checked by.....
License No. 612,600...
Expiration date.....

(Space above this Line for Official use only.)

.....

Instructions on the back of this sheet should be carefully read before this application is filled in. Answers must be written legibly or typewritten if possible.

APPLICATION FOR SHIP'S STORES LICENSE.

Applicant's Reference No. ——.

Date Jan. 14, 1918.

Bureau of Export Licenses,
1435 K. Street, NW.,
Washington, D. C.

I

We hereby apply for license (1) ships stores as
(Quantity)
per attached list of (2) Norwegian M. S. "Bayard."
(Goods)

Australia and back to San Francisco. Valued at (3) $—— to (4) ———— at (5)

(Consignee.)

————————————,

(Address.)

(6) Goods will be ready for shipment Immediately, 191—.

(7) If the goods are to be re-exported, state to what country ——. [60]

(Signed) P. W. BELLINGALL,
By R. R. BELLINGALL,

(8) Applicant's Address 409 Washington St. San Francisco.

(9) License to be sent to P. W. Bellingall,

(10) Address 409 Washington St., San Francisco.

(Over.)

Please read carefully before filling in application. This will avoid delay.

(a) A separate application must be made for each country of destination.

(b) A separate application must be made for each commodity. If goods covered by a license are to be shipped in more than one consignment the shipper may use form entitled "Certificate for Partial Shipment against Export License."

(c) To avoid delays, applicants are requested, in case of further communication, to refer to their own reference number and date as well as to the reference number of the Bureau of Export Licenses, if known, and to refer to each application in a separate letter.

(d) The statement in regard to the quantity should be made in definite units of net weight or measure, such as tons (of 2240 pounds each) pounds, bushels, gallons, etc., and not in such terms as boxes, cases, sacks, etc. Measurement must be in tons of 40 cubic feet or fraction thereof. Measurement need not be given in the case of goods which are by custom shipped on a weight basis. Description of goods must include number of packages and contents of each. Values must be in dollars.

(e) Responsibility of exporter. Failure on the part of the applicant to take reasonable precaution as to the distribution of goods or the granting of an export license based upon the statements contained in this application, will not relieve the consignor [61] from any responsibility to which he may be liable for affording aid or comfort to the enemy.

(f) Applicants are advised, if possible, to send in their applications at least two weeks in advance of the proposed date of ocean shipment, or as much earlier as possible. Export licenses, however, will not be issued more than 60 days before the proposed date of ocean shipment. Ocean bills of lading must bear date earlier than the expiration date shown on the license. If a license expires before a shipment is made and a renewal is desired, the original and duplicate copy of the original license must be returned with an Application Form E, entitled "Application for Renewal of Export License." Original and or renewal applications will be considered in the order received.

(g) When filled in and signed send this application to the Bureau of Export Licenses, 1435 K Street NW., Washington, D. C., or to any branch of that bureau.

(h) Copies of all forms may be secured from the Bureau of Export Licenses, 1435 K Street NW., Washington, D. C., or from branch office of that bureau at No. 11 Broadway, New York, or from any branch of that bureau.

(Bill-Head Foard-Barstow Ship Chandlery Co.)
San Francisco, Cal., January 11, 1918.
Norwegian M. S. "Bayard."

DECK.

1 bbl. Boiled Oil
20 gls. Raw Oil
65 gls. Coal Oil
2 gls. Varnish
2 gls. Turpentine
2 gls. Dryer
300 lbs. Sal. Soda
150 lbs. wh. Cotton Waste
12 pkgs. Gold Dust
1 doz. Paint Brushes
½ doz. Bath Bricks
1½ doz. Br. Shine
½ doz. glv. Buckets
½ doz. Deck Scrapers
2 lbs. Pumice Stone
2 lbs. Bees Wax
2 coils 15 thread Manilla

7 coils EB 3 thread Manilla
1 small coil Spunyarn
1 hank Cotton Twine
1 reel Wire
1 coil Wire Seizing [62]
2 lengths Hose
30 lbs. Wire Nails
2 lbs. Carpenter Glue
2 lbs. Carpenter Chalk
1 Grind Stone
10 feet Rubber Packing
2 Sailmaker Palm
1 doz. Sheet Sandpaper
3 wire Brushes
3 bbtls. Log oil
10 lbs. Copper Tacks
4 doz. Fairy Soap
1 Odorant
4 Coal Shovels
2 electric Hand Lamps
4 electric Batteries
1 pair Pliers
1 Combination Screw Driver
1 pc. Wire Netting
1 roll Coir Matting
5 doz. Lamp Glasses
½ doz. Rubbing Brushes
2 Marlin Spikes
2 Hand Lanterns
1 Bolt Cotton Duck

(Rubber Stamp:) Copy.

(Bill-Head Foard-Barstow Ship Chandlery Co.)

San Francisco, Cal., January 11, 1918.

Norwegian M. S. "Bayard."

ENGINE.

2 bbls. Coal Oil
2 bales Cotton Waste
1 bale San. Rags
75 lbs. Sal. Soda
100 lbs. Soft Green Soap
2 doz. Hack Saw Blades
30 lbs. Mogul Cup Grease
2 lbs. Italien Hemp
5 lbs. 3/8 Hemp Packing
5 lbs. 1/2 Hemp Packing
3 lengths round Iron
1 wood Rasp
1 pc. glv. Sash Cord
4 glv. Iron Buckets
1 roll Drawing Paper
2 doz. ass. Cotter Pine
4 bit Stock Drills
6 ass. Files
1 oil Gun
2 tins Smooth-on
1 Record Book
2 doz. Sweat Towels
1 gross Matches
1 doz Stub Pens
1/2 doz Pencils
2 Note-Pads
75 lbs. White Lead

2 gals. White Damar
2 qts. Varnish for Linoleum
½ gl. Wh. Japan
2 lbs. Prussian Blue
12 gls. Gray Gas Engine Enamel
200 lbs. White Zinc
5 gls. Boiled Oil
1 Mirror
1 Wash Basin
1 Drawer Pull
2 Wall Sockets
4 Franco Batteries
2 doz. Sheets Emery Cloth

CABIN & GALLEY.

50 lbs. sal Soda
25 lbs. wh. cotton Waste
12 pkgs. Gold Dust
50 lbs. soft Soap
1 doz. Washing Rags
6 Lamp Shades
3 doz. Cakes Soap
50 lbs. Sal. Soda
30 lbs. Compound
1 bale san. Rags
25 Carbon Lamps
3 Electric Sockets
60 small Copper Rivets

(Rubber Stamp:) Copy. [63]

150 lbs. Beets
75 lbs. Tomatoes
24 Bottles Chow Chow
24 bottles Pickles

6 Bottles French Mustard
30 Glasses Jam
2 Cases Apricots
1 Case Pineapples
1 Case Pears
1 Case Tomatoes
2 Doz. Tomatoe Soup
2 doz. Chicken Soup
2 doz. Clam Soup
2 doz. Vegetable Soup
100 Heads Cabbage
30 Heads Cauliflower
30 Bunches Celery
300 lbs. Bacon
2 Cases Royal Baking Powder
4 Cases Apples
2 Cases Oranges
2 Bunches Bananas
1 Case Norw. Sardines
2 Cases Booth's Sardines
2 Cases Corn Beef, 2 lbs. Tins
2 Cases Red Salmon
1 Case Boiled Beef, 6 lbs. Tins
6 Cases Lime Juice
2 Cases Sweet Peas
2 Cases String Beans
1 Case D. M. Asparagus
12 Bottles Chili Sauce
24 Bottles Worchester Sauce
12 Bottles Olive Oil
12 Bottles Essence of Vinegar
12 Bottles Red Color

3 Cases Fish Balls
2 Cases Hamburger Steak
2 Cases Soda Crackers
3 Cases Eggs
1 Case Jams in 10 lbs. Tins
300 lbs. Salt Pork
2 Kegs Pigs Feet
½ bbl. Salmon
40 Sacks Potatoes
2 Cases Corn
5 gals. Pickles
7 Cases Evap. Milk
6 Cases Cond. Milk
½ bbl. Codfish
6 Bottles Essence
5 gals. Claret
104 Sacks of Flour
1 Case Lunch Tongues
8 Sacks Rye Flour
3 bbls. Beef
1 bbls. Pork
2 Cases Pilot Bread
½ bbl. Herring
75 lbs. Sago
75 lbs. Pearl Barley
100 lbs. Quaker Oats
75 lbs. Rasins
50 lbs Prunes
10 lbs. Currants
200 lbs. Cabin Butter
450 lbs. Crew Butter
120 lbs. Lard

800 lbs. Sugar
100 lbs. Cube Sugar
50 lbs. Dried Apricots
150 lbs. Rice
10 lbs. Pepper
4 lbs. Pepper Whole
4 lbs. Cinnamon Whole
6 lbs. Cinnamon Ground
6 lbs. Ginger
4 lbs. Nutmeg
2 lbs. Cloves.
6 lbs. Compressed Yeast
300 lbs. Coffee
25 lbs. Coffee Cabin
15 lbs. Tea, Crew
200 lbs. Dairy Salt
300 lbs. Hf. Grd. Salt
4 lbs. Hops
150 lbs. Pink Beans
2 lbs. Carroway Seed
2 lbs. Paprika
12 lbs. Jello
550 lbs. Codfish
80 lbs. Corn Starch
150 lbs. Cheese
75 lbs. Swedish Sausage
1 lb. Curry Powder
24 lbs. Pudding Powder
200 lbs. Onions
400 lbs. Carrots
400 lbs. Yellow Turnips
100 lbs. White Turnips

1 Case Cocoa
4 Boxes Magic Yeast
25 lbs. Corn Meal
1 Case D. M. Catsup
1 Case Puree Tomatoes
1 Case Lemons

(Rubber Stamp:) Export License is hereby granted for all articles contained in shipment requiring a license, provided the same are exported on or before —— 19 ——.

EXPORTS ADMINISTRATIVE BOARD.
C. A. RICHARDS.
I. H. Cory.

[64]

STORES M/S "BAYARD"

1500 lbs. Beef
300 lbs. Mutton
300 lbs. Pork
300 lbs. Veal
200 lbs. Frankfurters
25 lbs. Lunch Sausages
50 lbs. Calf Liver
100 lbs. Smoked Fish Salmon
250 lbs. Asst Fresh Fish

3025 lbs.

LIST OF STORES FOR NORW. MOTOR STEAMER "BAYARD."

1 Bale Sanitary Rags
1 doz. Hack Saw Blades
2 Tins Mogul Compound
12 Excelsior Mattresses

1 Wire Spring Mattress
1 bbl. Tar
60 lbs. Wire Nails
20 gals. Kerosine Oil
1 Walkers Log Complete
1 bbl. Coal Oil
25 lbs. Soft Soap
100 lbs. Sal. Soda
2 Tins Mogul Compound
1 Pce. Sheet Brass
12 Cosmos Glasses
2 doz. Brass Screws
6 only Table Cloths
1 bbl. Boiled Oil
20 gals. Raw Linseed Oil
65 gals. Coal Oil
2 gals. Copal Barnish
2 gals. Turpentine
2 gals. Dryer
300 lbs. Sal. Soda
150 lbs. Cotton Waste
12 Pkgs. Gold Dust
½ doz. Paint Brushes
½ doz. Bath Bricks
1½ doz. Qts. Brilliantshine
½ doz. Hvy. Galv. Buckets
½ doz. Scrapers
2 lbs. Pumice Stone
2 lbs. Beeswax
2 coils 15 thrd. Manila
7 Coils 3″ Plym. Manila
5 lbs. Spunyard

100 ftms. Cotton Seine Twine
1 Coil 2¾ Flex. St. Wire
1 Coil Wire Seizing
2 Lengths Fire Hose
30 lbs. Wire Nails
2 lbs. Glue Carp
2 lbs. Chalk
1 Grindstone
10 ft. Porthole Rubber [65]
2 Palms
1 doz. Sheets Sandpaper
3 Steel Brushes
3 Bottles 3 in 1 Oil
10 lbs. Copper Tracks
4 doz. Cakes Fairy Soap
1 Adorant
50 lbs. Sal. Soda
25 lbs. White Cotton Waste
12 pkgs. Gold Dust
50 lbs. Soft Soap
1 doz. Washing Rags
4 Coal Shovels
½ doz. Paint Brushes
2 Electric Hand Lamps Complete
4 Extra Batteries
2 bbls. Coal Oil
2 Bales Cotton Waste
1 Bale Rags
75 lbs. Sal Soda
100 lbs. Soft Gr. Soap
2 doz. Hack Saw Blades
30 lbs. Mogul Cup Grease

2 lbs. Italian Hemp
10 lbs. Hemp Packing
3 Lengths Rd. Iron
1 Hf. Rd. Hasp
50 ft. 1/16″ Galv. Sash Cord
4 Galv. Iron Buckets
1 Roll Drawing Paper
2 doz. St. Cotter Pins
4 Bit St. Drills
6 Files
1 Oil Gun
2 Tins Smooth On
1 Record Book
2 doz. Sweat Towels
1 Gross Matches
1 doz. Stub Pens
½ doz. Pencils
2 Note Pads
75 lbs. White Lead
2 gals. White Damar
2 qts. Varnish
½ gal. White Japan
2 lbs. Pruss. Blue
12 gals. Gas. Eng. Enamel
200 lbs. White Zinc
5 gals. Boiled Oil [66]

LIST OF STORES FOR NORWEG. MOTOR STEAMER "BAYARD."

1 S. C. Pliers
1 Screw Driver
1 Pce. Wire Netting
1 Mirror

1 Drawer Pull
1 Wash Basin
2 220 Volts Wall Sockets
4 Batteries
1 Bolt Cotton Duck
100 ft. Coir Matting
5 doz. Kosmos Glasses
½ doz. Hand Scrub. Brushes
2 Marlin Spikes
2 Tubular Lanters
24 Sheets Emery Cloth
50 lbs. Sal. Soda
30 lbs. Mogul Compound
1 Bale Rags
25 Carbon Lamps
3 Sockets
80 Copper Rivets & Burrs
3 doz. Cakes Soap
1 doz. Sapolia

STORES M/S "BAYARD"

28 lbs. Rubber Packing
14 lbs. Asbestos Packing
18 lbs. Gearlock Packing
14 lbs. Fiber
7 lbs. Leather
19 lbs. Waste
25 lbs. Sanitary Rags
3 lbs. Soft Soap
3 Pieces of Bar Iron
17 Lamp Wicks
1 Bar Solder

1 Box Smooth On
90 lbs. White Metal
240 lbs. Zinc White
4 gal. Linseed Oil
140 Red Lead
60 lbs. Black Paint
6 lbs. Chalk
230 Electric Lamps
75 ft. Lamp Wiring
24 Fuses
8 Brushes
174 Fuses
2 Spools of Wire
1½ lbs. Magneto Wire
2 gals. Gray Paint
½ lb. Solder Paste
9 gals. Oil
10 lbs. Solder

STORES M/S "BAYARD"

625 lbs. White Zinc
275 lbs. Mast Color
150 lbs. Pitch
20 gals. Boot Top
15 gals. Battle-ship Gray
3 gals. Vermillion
1 gal. Blue Paint
8 gals. Gray Hull Paint
5 gals. Stabil Inside
1 gal. Canvas Preservative
20 gals. Stockholm Tar
5 gals. Crude Carbolic Acid

10 Gals. Raw Linseed Oil
25 gals. Boiled Linseed Oil
10 gals. Kerosene
5 gals. Bitumastic
5 gals. Japan Dryer
2 gals Turpentine
8 qts. Aluminum
1 gal. Spar Varnish
3 Coils 3″ Manilla Rope [67]
2 Coils 2½″ Manila Rope
5 lbs. Spunyard
1 Bale Oakum
2 New Patent Cargo Wheels

War Trade Board.
Exports Administrative Board.
1435 K Street Washington, D. C.

612595
License No. Jan.14 8
Date Mar. 15 1918
Expires—— 191—
Applicant's No. EMD

UNITED STATES OF AMERICA SHIP'S STORES LICENSE.

Permission is hereby granted Norway Pacific Line, of 433 California St., San Francisco, to export as per detailed list attached, of Ship's Stores. Nor. Motor Ship "Bayard" total value $——, from the United States to Sydney & Melbourne, Aust. at —— by any vessel flying —— flag.

This license is issued on the basis of the statements made in your application, and is subject to

the rules and regulations which have been, or which may be hereafter, issued by the Exports Administrative Board.

The above license number must appear on the export bill of lading and export declaration.

EXPORTS ADMINISTRATIVE BOARD.
VANCE C. McCORMICK,
Chairman.

Countersigned:

C. A. RICHARDS,
Director of Bureau of Export Licenses.
By————————.

Original and Duplicate sent to (Applicant, Forwarding Agent).

This License Not Valid Unless Countersigned and Impressed with the Seal of the Exports Administrative Board. This License is Revocable.

Shipped Complete —— 191—.

War Trade Board.
612595
Form E A B 14. [68]

Form E. A. B. 49. Application Form A-2.
Exports Administrative Board
Bureau of Export Licenses
1435 K Street NW., Washington.

App. No. ————
Disposition ————
Date ————
Drawn By ————
Checked By ————
License No. 612595
Expiration date ———

(Space above this line for official use only.)

Instructions on the back of this sheet should be carefully read before this application is filled in. Answers must be written legibly or typewritten, if possible.

APPLICATION FOR ORDINARY SHIP'S STORES LICENSE.

Applicant's Reference No. —— Date Jan. 7, 1918.
Bureau of Export Licenses,
1435 K Street NW.,
Washington, D. C.

I hereby apply for license to export (1) ship's stores.

We (Quantity.)
of (2) (as per detailed list attached) Valued at (3)
(Goods.)
$—— to (4) Nor M/S Bayard at (5) Sydney & Melbourne Aust.
(Consignee) (Address)
(6) Goods ~~will~~ ~~be~~ ready for shipment—— (7) If

the goods are to be re-exported, state to what country——

(Signed) NORWAY PACIFIC LINE,
By Davison,

(8) Applicant's Address 433 Calif. St.,
San Francisco.

(9) License to be st to P. W. Bellingall, Custom House Broker, 409 Washington St. (10) Address San Francisco. (Over.)

Please Read Carefully Before Filling in Application. This Will Avoid Delay.

(a) A separate application must be made for each country of destination.

(b) A separate application must be made for each commodity. If goods covered by a license are to be shipped in more than one [69] consignment the shipper may use from entitled "Certificate for Partial Shipment against Export License."

(c) To avoid delays, applicants are requested, in case of further communication, to refer to their own reference number and date as well as to the reference number of the Bureau of Export License, if known, and to refer to each application in a separate letter.

(d) The statement in regard to the quantity should be made in definite units of net weight or measure such as tons (of 2240 pounds each), pounds, bushels, gallons, etc., and not in such terms as boxes, cases, sacks, etc. Measurement must be in tons of 40 cubic feet or fraction thereof. Measurement need not be given in the case of goods which are by custom shipped on a weight basis. Description of goods must include number of

packages and contents of each. Values must be in dollars.

(e) Responsibility of exporter.—Failure on the part of the applicant to take reasonable precaution as to the distribution of goods or the granting of an export license based upon the statements contained in this application, will not relieve the consignor from any responsibility to which he may be liable for affording aid or comfort to the enemy.

(f) Applicants are advised, if possible, to send in their applications at least two weeks in advance of the proposed date of ocean shipment, or as much earlier as possible. Export licenses, however, will not be issued more than 60 days before the proposed date of ocean shipment. Ocean bills of lading must bear date earlier than the expiration date shown on the license. If a license expires before a shipment is made and a renewal is desired, the original and duplicate copy of the original license must be returned with an Application Form E, entitled "Application for Renewal of Export License." Original and/or renewal applications [70] will be considered in the order received.

(g) When filled in and signed send this application to the Bureau of Export Licenses, 1435 K Street NW., Washington, D. C., or to any branch of that Bureau.

(h) Copies of all forms may be secured from the Bureau of Export Licenses, 1435 K Street NW., Washington, D. C., or from branch office of that bureau at No. 11 Broadway, New York, or from any branch of that bureau.

Ship's Stores of the Norwegian Motor-Ship "Bayard."

20 Barrels Lubricating Oil
104 Sacks Flour [71]

Exhibit "C."

War Trade Board.
Exports Administrative Board.
1435 K Street,
Washington, D. C.

License No. Jan. 14 8
Date Mar. 13, 1918
Expires 191—.
Applicant's No. EMD

UNITED STATES OF AMERICA BUNKERS LICENSE

Permission is hereby granted Norway Pacific Line, of 433 California St., San Francisco, Cal., to export 550 tons (Five per cent. more or less) of Fuel Oil. Nor. M. S. "Brazil" total value, $—— from the United States to Wellington, N. Z.., and return to S. F. at —— by any vessel flying —— flag.

This license is issued on the basis of the statements made in your application, and is subject to the rules and regulations which have been, or which made hereafter be issued by the Exports Administrative Board.

The above license number must appear on the export bill of lading and export declaration.

EXPORTS ADMINISTRATIVE BOARD.

VANCE C. McCORMICK,
Chairman.

Countersigned: L. L. RICHARDS,
Director of Bureau of Export Trans.

By————————.

Original and Duplicate sent to (Applicant, Forwarding Agent.)

This License Not Valid Unless Countersigned and Impressed With the Seal of the Exports Administrative Board.

This License is Revocable.

Shipped Complete —— 191—

War Trade Board.

Form E A B 14. [72]

San Francisco, California, Jan. 14th, 1918.

Hon. Collector of Customs,
District and Port of San Francisco.

Sir: Complying with the requirements in telegram from the Bureau of Transportation, War Trade Board, allowing the Nor. M/S "Brazil" 550 Tons, 3850 barrels, 161700 gallons of bunker oil, for voyage from San Francisco to Wellington, N. Z. and return, we hereby guarantee that this vessel, the Nor. M/S "Brazil" will proceed from San Francisco to Wellington, N. Z. and after taking on cargo will return directly to the United States, and that its en-

tire cargo shall be discharged at a port or ports of the United States.

AUG. LARSEN X.
Master Nor. M/S "Brazil."
NORWAY PACIFIC LINE, Agency.
F. Wm. Kutter, Secty.
Agents Nor M/S Brazil.

Sworn to before me, this 14th day of January, 1918.

[Seal] M. J. LAWRENCE,
Notary Public.

Form E. A. B. 49. Application Form A–2.

Exports Administrative Board.
Bureau of Export Licenses.
1435 K. Street, NW.
Washington.

App. No. ———
Disposition ———
Date ———
Drawn by ———
Checked by———
License No. ———
Expiration date ———

(Space above this line for official use only.)

Instructions on the back of this sheet should be carefully read before this application is filled in. Answers must be written legibly or typewritten, if possible.

APPLICATION FOR ORDINARY BUNKER LICENSE.

Applicant's Reference No. ——Date Jan. 7, 1918.

Bureau of Export Licenses,
1435 K Street NW.,
Washington, D. C.

I

We hereby apply for license to export (1) 550 Tons (Quantity.)

[73]

of (2) Fuel Oil Valued at (3) $ —— to (4) Nor. (Goods.)

M/S Brazil at (5) San Francisco, Wellington, N. Z.
(Consignee) (Address)

(6) Goods ~~will be~~ ready for shipment————(7) If the goods are to be re-exported, state to what country————Voyage—From San Francisco to Wellington, N. Z., and return to San Francisco.

(Signed) NORWAY-PACIFIC LINE,
By Davison

(8) Applicant's address, 433 California St., San Francisco. (9) License to be sent to P. W. Bell-in all, Custom House Broker, 409 Washington St. (10) Address San Francisco.

(Over.)

Please read carefully before Filling in Application. This will avoid delay.

(a) A separate application must be made for each country of destination.

(b) A separate application must be made for each commodity. If goods covered by a license are

to be shipped in more than one consignment the shipper may use form entitled "Certificate for Partial Shipment against Export License."

(c) To avoid delays, applicants are requested, in case of further communication, to refer to their own reference number and date as well as to the reference number of the Bureau of Export Licenses, if known, and to refer to each application in a separate letter.

(d) The statement in regard to the quantity should be made in definite units of net weight or measure, such as tons (of 2240 pounds each), pounds, bushels, gallons, etc., and not in such terms as boxes, cases, sacks, etc. Measurement must be in tons of 40 cubic feet or fraction thereof. Measurement need not be given in the case of goods which are by custom shipped on a weight basis. Description of goods must include number of packages and contents of each. Values must be in dollars. [74]

(e) Responsibility of Exporter.—Failure on the part of the applicant to take reasonable precaution as to the distribution of goods or the granting of an export license based upon the statements contained in this application, will not relieve the consignor from any responsibility to which he may be liable for affording aid or comfort to the enemy.

(f) Applicants are advised, if possible, to send in their applications at least two weeks in advance of the proposed date of ocean shipment, or as much earlier as possible. Export licenses, however, will not be issued more than 60 days before the proposed

date of ocean shipment. Ocean bills of lading must bear date earlier than the expiration date shown on the license. If a license expires before a shipment is made and a renewal is desired, the original and duplicate copy of the original license must be returned with an application Form E, entitled "Application for Renewal of Export License." Original and/or renewal applications will be considered in the order received.

(g) When filled in and signed send this application to the Bureau of Export Licenses, 1435 K Street NW., Washington, D. C., or to any branch of that bureau.

(h) Copies of all forms may be secured from the Bureau of Export Licenses, 1435 K Street NW., Washington, D. C., or from branch office of that bureau at No. 11 Broadway, New York, or from any branch of that bureau. [75]

Exhibit "D."

War Trade Board.
Exports Administrative
Board.
1435 K Street, Washington, D. C.
License No. 612640.
Date—Jan. 14, 1918.
Expires—Mar. 15, 1918.
Applicant's—No. EMD.

SHIP'S STORES LICENSE.

Permission is hereby granted Pacific Line, of 433 California St., San Francisco, Cal. to export as per

detailed list attached (Five per cent, more or less), of Ship's Stores, Nor. M. S. "Brazil" total, $ —— from the United States to Wellington, N. Z. at —— by any vessel flying —— flag.

This license is issued on the basis of the statements made in your application, and is subject to the rules and regulations which have been, or which may be hereafter, issued by the Exports Adminstrative Board.

The above license number must appear on the export bill of lading and export declaration.

EXPORTS ADMINISTRATIVE BOARD.
VANCE C. McCORMICK,
Chairman,

Countersigned:

C. A. RICHARDS,
Director of Bureau of Export Licenses.
By————————

Original and Duplicate sent to (Applicant—Forwarding Agent.

This License Not Valid Unless Countersigned and Impressed with the Seal of the Exports Administrative Board.

This License is Revocable.

Shipped Complete —— 1919—.

War Trade Board, 612640.

Form E. A. B. 14.

Port of San Francisco, Jan. 14th, 1918.

I, Aug. Larsen, Master of the Norwegian Motor Ship "Brazil", do solemnly swear that the ship's stores permitted to be laden on board said vessel,

shall not be transferred at sea to any vessel not landed at any foreign port.

AUG. LARSEN, X
Master. [76]

Subscribed and sworn to or before me, this 14th day of January, 1918.

[Seal] M. J. LAWRENCE,
Notary Public,

Form E. A. B. 49. Application Form A–2.
Application No.———
Disposition———
Date———
Drawn By———
Checked By———
License No. 612,640
Expiration date———

(Space above this line for official use only.)

Instructions on the back of this sheet should be carefully read before this application is filled in. Answers must be written legibly or typewritten, if possible.

APPLICATION FOR ORDINARY SHIP'S STORES LICENSE.

Applicant's Reference No. —— Date Jan. 7, 1918.

Bureau of Export Licenses,
1435 K Street NW.,
Washington, D. C.

I

We hereby apply for license to export (1) ship's stores of (2) (as per detailed list attached)
(quantity) (Goods.)

Valued at (3) $——to (4) Nor. M/S Brazil at (5)
(Consignee)
San Francisco. (6) Goods ~~will~~ ~~be~~ ready for ship-
(Address.)
ment ——. Wellington, N. Z. (7) If the goods are to be re-exported, state to what country ——.

(Signed) NORWAY PACIFIC LINE.
By Davison.

(8) Applicant's Address 433 California St., San Francisco.

(9) License to be sent to P. W. Bellingall (10) Address Custom House Broker 409 Washington St. San Francisco. ,

(Over)

[77]

PLEASE READ CAREFULLY BEFORE FILLING IN APPLICATION. This will avoid delay.

(a) A separate application must be made for each country of destination.

(b) A separate application must be made for each commodity. If goods covered by a license are to be shipped in more than one consignment the shipper may use form entitled "Certificate for Partial Shipment against Export License."

(c) To avoid delays, applicants are requested, in case of further communication, to refer to their own reference number and date as well as to the reference number of the Bureau of Export Licenses, if known, and to refer to each application in a separate letter.

(d) The statement in regard to the quantity should be made in definite units of net weight or measure, such as tons (of 2240 pounds each), pounds, bushels, gallons, etc., and not in such terms as boxes, cases, sacks, etc. Measurement must be in tons of 40 cubic feet or fraction thereof. Measurement need not be given in the case of goods which are by custom shipped on a weight basis. Description of goods must include number of packages and contents of each. Values must be in dollars.

(e) Responsibility of exporter.—Failure on the part of the applicant to take reasonable precaution as to the distribution of goods or the granting of an export license based upon the statements contained in this application, will not relieve the consignor from any responsibility to which he may be liable for affording aid or comfort to the enemy.

(f) Applicants are advised, if possible, to send in their applications at least two weeks in advance of the proposed date of ocean shipment, or as much earlier as possible. Export licenses, however, will not be issued more than sixty days before the proposed [78] date of ocean shipment. Ocean bills of lading must bear date earlier than the expiration date shown on the license. If a license expires before a shipment is made and a renewal is desired, the original and duplicate copy of the original license must be returned with an Application Form E, entitled "Application for Renewal of Export License." Original and/or renewal ap-

plications will be considered in the order received.

(g) When filled in and signed send this application to the Bureau of Export Licenses, 1435 K Street NW., Washington, D. C., or to any branch of that bureau.

(h) Copies of all forms may be secured from the Bureau of Export Licenses, 1435 K Street NW., Washington, D. C., or from branch office of that bureau at No. 11 Broadway, New York, or from any branch of that bureau.

Ship's Stores of the Norwegian Motor Ship "Brazil."

36 Barrels Lubricating Oil.
40 Sacks Flour.

(Bill-Head of Foard-Barstow Ship Chandlery Co.)

San Francisco, Cal., January 14, 1918.

Norwegian M. S. "Brazil."

Cabin & Galley.

3 Bread Pans
5 Laddles
1 Water Dipper
2 Buckets
12 Knives
12 Cups & Saucers
6 Spoons
24 Plates
2 Doz. Tumblers
1 Lamp Shade
120 lbs. Sal. Soda
200 lbs. soft Soap [79]
1 doz. Pkgs. Gold Dust
15 lbs. Cotton Waste

25 B San. Rags
1 doz. Candles
1 doz. Tins Metal Polish
1 doz. Lamp Wicks
12 tins Shoe Polish
1 doz. tins Vaseline
1 Qt. Benzine
3 Bath Bricks
500 Paper Napkins
DECK.
5 Flags
1 Nautical Almanac
4 pieces Glass
4 Tons Galley Coal
1 Pc. Cotton Duck
12 Pc. Lumber
4 Wire Brushes
ENGINE.
10 Gls. Green Paint
1 doz. Pkgs. Gold Dust
2 doz. Cakes Soap
1 bale San. Rags
5 lbs. Cotton Waste
4 doz. Brass Mach. Screws
(Rubber Stamp:) COPY. [80]

Testimony of F. W. Kutter, for Libelant.

F. W. KUTTER, called for the libelant, sworn.

Mr. FRANK.—Q. Mr. Kutter, you are the secretary of the Norway-Pacific Line? A. I am.

Q. The Norway-Pacific Line is an agency for handling vessels?

(Testimony of F. W. Kutter.)

A. Norway-Pacific Line Agency is the name of the corporation.

Q. That is the name of the corporation?

A. Yes.

Q. As such agent, were you handling the "Bayard" during the time here in controversy?

A. We were.

Q. Were you handling the "Brazil" also?

A. We were.

Q. Who were the owners of the "Brazil"?

A. A. S. Gangerrolf—I don't know the Norwegian pronunciation of it.

Q. Was that a different association, a different set of men, from those that owned the "Bayard"?

A. As far as I know, that is a corporation in Norway; the owners are in Norway. I could not tell whether the same people are interested in that boat as are in the "Bayard."

Q. When I say "the same people," I do not mean that there may not be the same stockholders in both corporations, but they are different corporations, are they not? A. Different corporations.

Q. Are your accounts kept separately for them?

A. Our account is kept separately for each vessel.

Q. That is what I mean.

A. For each vessel the account is kept separately.

Q. What is the measurement carrying capacity of the "Bayard"?

A. It is about 7500 tons measure.

Q. You heard the testimony this morning of Mr. Moore as to his offer of $400,000 for a voyage from

(Testimony of F. W. Kutter.)

here to Manila, to two ports, and back to San Francisco? A. Yes.

Q. Did you handle, at your end, these negotiations?

A. They were handled through our office. [81]

Q. Now, what was done with respect to them?

A. We cabled to our head office at Christiania, asking them to give us a free hand with the chartering of the boat.

Q. Before you received the reply, what happened?

A. The collision occurred.

Q. What did that do?

A. That stopped all negotiations.

Q. Now, I have here a list of items as to the cost of handling cargo under the charter of May 16, 1917, of this vessel, the "Bayard" on a voyage charter. Is that a true transcript of the expenses as they show upon your books?

A. That is an exact copy of the vouchers covering expenses incurred on that trip.

Mr. GRIFFITHS.—That was May 16, last year?

Mr. FRANK.—May 16, 1917. That is the time the charter was entered into. When was the voyage undertaken? When did she leave here on that voyage? A. Under that charter?

Q. Yes.

A. It was within perhaps a month after the charter was made. I don't know the exact date; about a month after.

Q. Is this the first or the second of the voyages?

(Testimony of F. W. Kutter.)

A. That is the second charter, the charter that she had just finished.

Q. Just finished when she got in? A. Yes.

Q. Just the day before the collision?

A. That is, she had finished discharging the day before the collision.

Mr. GRIFFITHS.—That is the cost of handling cargo at what point?

Mr. FRANK.—I suppose wherever they handled it. The witness will be able to tell you better than I.

Mr. GRIFFITHS.—Q. Have you got the dates of this list of items? This is simply a list of the items without any dates.

A. We can get the dates; we have got all the vouchers.

Q. Have you got the entries as they are made up in your account [82] books?

A. We simply make up a statement of account to our head office of our disbursements. These are the copies of disbursements.

Q. The original copy is submitted to the owners?

A. This is a copy of what was submitted to the owners showing the disbursements.

Q. This was a charter from San Francisco outward—from San Francisco to the Philippines?

A. From San Francisco to the Philippines and return to San Francisco.

Q. Does this cover all the expenses and costs of handling the cargo outward and back—cost of handling the cargo on the entire round trip?

A. On the entire round trip.

(Testimony of F. W. Kutter.)

Q. The second item here is stevedoring discharging $3,726.45. That would be where?

A. May I look at that?

Q. Yes.

A. That is discharging at San Francisco.

Q. That is when you got back?

A. When we got back.

Mr. FRANK.—Let me see that. Is that discharging? A. Stevedoring.

Q. Stevedoring when? A. At San Francisco.

Q. On the previous voyage, or on this particular voyage? A. On this particular voyage.

Q. It was on that particular voyage and not on the previous voyage?

A. No, these charges were all on that voyage, the previous voyage.

Mr. GRIFFITHS.—Q. What is the first item, that is, loading? A. Loading outward.

Q. Loading at San Francisco? A. Yes.

Q. Then the second is discharging at San Francisco? A. Yes.

Q. Where are the loading items on the other side?

A. The Philippine expenses.

Q. Does that include loading and discharging?

A. That includes the entire expenses in the Philippines; that is what the captain's [83] disbursements were down there; that is the total.

Q. That is the lump figure; that includes everything on the other side: Is that it? A. Yes.

Q. Mr. Kutter, this list that you have here, together with the expenses of the crew, I mean the

(Testimony of F. W. Kutter.)

wages, etc. of the crew, represent the entire cost of the round trip?

A. That would represent the entire cost of the round trip outside of taxes and insurance, of which we have no record here.

Mr. FRANK.—The matter of taxes and insurance has nothing to do with this case.

Mr. GRIFFITHS.—Q. When you render an account to your owners, don't you render it itemized under dates?

A. No, we simply send them the vouchers with an account made up similar to that, without reference to dates.

Q. Is this an account made up for the owners?

A. That is a copy of the statement of disbursements.

Q. I notice the item at the bottom, "Cost of operating vessel," and then there is something taken off.

Mr. FRANK.—That was insurance and things of that sort, and I took it off.

Mr. GRIFFITHS.—All right.

Mr. FRANK.—I offer this in evidence as expenses on a voyage charter. The total amount is $21,920.70.

(The document was marked Libelant's Exhibit 2.)

Q. You were acquainted at that time, Mr. Kutter, with the cargoes that were offering and the prices that were paid, were you not? A. Partly so, yes.

Q. For an outward voyage, was there much case oil offering?

(Testimony of F. W. Kutter.)

A. We could always charter the vessel for a cargo of case oil.

Q. Well, I mean outside of the charter, putting her on berth?

A. Yes, we could have stood a full cargo of case oil or other [84] commodities; there is always plenty of cargo offering for the Philippines.

(Extra page inserted.)

Mr. FRANK.—On page 72 of the record, your Honor, we have an answer by Mr. Hutter on the 12th and 13th lines, in which he says: "She has carried a mixed cargo 3000 tons of Copra, about 1500 tons of sugar, and a couple of hundred tons of cocoanut oil." It is agreed that be amended to be 3047 tons of copra—

Mr. GRIFFITHS.—I have it here 3042, Mr. Frank; that must be an error.

Mr. FRANK.—No, I don't think so; it says here 3047.

Mr. GRIFFITHS.—Well, whatever the manifest shows.

(See page 84 of Transcript.)

Q. How much case oil did you carry?

A. She has carried 131,000 cases.

Q. What was the market rate at that time for case oil? A. About 85 to 90 cents a case.

Q. Now, on your homeward voyage, were there

(Testimony of F. W. Kutter.)

cargo offerings freely? A. Plentifully.

Q. What were they? A. Copra, principally.

Q. And sugar?

A. Sugar and cocoanut oil, etc.

Q. How many tons or copra could she carry?

A. She has carried a mixed cargo 3000 tons of copra, about 1500 tons of sugar, and a couple of hundred tons of cocoanut oil.

Q. What was the going price then for the copra per ton?

A. The copra was offering as high as $80 a ton.

Q. And sugar? A. Sugar from $35 to $50.

Q. And cocoanut oil? A. $45 to $50.

Q. Was the Government interfering in anywise with the "Bayard" at that time?

A. No, other than the charter would have to be submitted for approval; that is all. [85]

Q. If you put her on dock she would not have to submit to anything for approval?

A. The same procedure would have to be gone through, subject to approval of the shipping board.

Q. If you put her on the dock?

A. On the berth at that time they were not interfering very much, when it first started.

Q. Of course, there is a difference between a time charter and a voyage charter with regard to the expense that the ship is under? A. There is.

Q. In other words, all of these expenses that I have given you a list of would be eliminated in the case of a time charter? A. Yes.

(Testimony of F. W. Kutter.)

Q. The owner would not stand those expenses, but the charterer would?

A. The charterer would have to pay them.

The COURT.—It would not make any difference in the amount?

A. No, the amounts would practically work out about the same.

Mr. FRANK.—Q. What do you mean?

A. That is, the expenses of the handling of the cargo would be the same.

Q. But it would be transferred to the other party?

A. The charterer would assume all those expenses.

Mr. FRANK.—So that your Honor will understand the situation, while the 45 shillings is less, the expenses are also less, so that it would affect the profits in that way.

Mr. GRIFFITHS.—It would not work out then. The regular allowance of the shipping board for dead weight tonnage was 45 shillings per ton.

Mr. FRANK.—Our position is at that time there was no such restriction.

Mr. GRIFFITHS.—Mr. Kutter, this proposed charter to Mr. Moore was submitted by cable to your owners: That is, you had to have their consent before the charter was signed: That is true, is it not?

A. We always submit charters for their approval; that is, we have their approval before chartering.

Q. You never, in fact, did receive the consent of the owners to [86] that charter, did you?

(Testimony of F. W. Kutter.)

A. On account of the cable interruption—it took all the way from one week to two weeks before we had replies from Norway.

Q. Tell me when you had authority to pledge this ship to return to this port and here discharge her cargo?

A. That followed the charter party which was made up after agreeing that the vessel would go from San Francisco to Australia and return.

Q. Which charter party was that?

A. When the vessel was under charter to Australia, January 4.

Q. She was sailing for the shipping board?

A. No, she was not sailing for the shipping board; she was sailing for G. W. McNear, with the approval of the shipping board.

Q. When did you get the approval of the shipping board on that charter party?

A. I could not say the exact date; it was just before the charter party was made up.

Q. When was the charter party made up?

A. The 4th of January.

Q. When was it you got the consent of the owner to that charter party?

A. It would be shortly before that.

Q. Probably along about the 1st of January?

A. Along about that time.

Q. Now, as I take it, you understand that the consent of the owners for you to execute a charter party to Australia and back naturally carries with it the consent to agree by separate agreement with the

(Testimony of F. W. Kutter.)

war trade board that the vessel would come back?

A. We naturally had to under the charter party —we had to agree to that.

Q. Now, then, there was no time between November 3d and January 1 when you had authority to pledge that vessel to come back to this port, was there? A. We did not ask for it.

Q. But as a matter of fact you did not have it, did you?

A. We did not ask for it. We never ask for those agreements until a few days before the vessel sails. [87]

Q. It would take you a couple of weeks to get cable connection with Norway, wouldn't it?

A. When we cable for authority to charter, yes.

Q. Now, then, regardless of whether you ask for it or not, you did not have it until January 1?

A. Under this particular charter, we did not have it until the charter party was made up, which as I say, followed—necessarily followed our agreement to the Government to return the vessel.

Q. You said that you are agent also for the "Brazil." How long have you been agent for her?

A. We have been agent for the "Brazil" since she has been operated out of here, which was about October or November, 1916.

Q. To whom were you reporting back at that time on the "Brazil"?

A. How do you mean, reporting back?

Q. Who were her owners then?

A. Our head office is Fred Olson & Company, in

(Testimony of F. W. Kutter.)

Christiania, with whom we correspond.

Q. That is Fred Olson & Company, Prinsengade, Christiania, Norway? A. Yes.

Q. They are the owners?

A. They are the managing owners.

Q. Aren't they managing owners for both the "Brazil" and the "Bayard"? A. Yes.

Q. And have been during all of that time?

A. Yes.

Q. Did you submit to them the charters of both vessels, to Fred Olsen & Co., for approval?

A. They are the only ones we correspond with.

Q. They are the only ones you correspond with?

A. Yes.

Q. If it became necessary for you to sign or desirable for you to sign one of these bunker agreements, you would get your permission to sign either directly on that issue or through the charter party from Fred Olsen & Co., would you? A. Yes.

Q. Do you know of any change in ownership, aside from the managing owners during the period when you represented the "Brazil"?

A. Not to my knowledge. [88]

Q. What does the word "Aktieselskapet" mean?

A. Captain Bryn can tell you.

Mr. BRYN.—A limited company.

Mr. GRIFFITHS.—What does "Bonheur" mean?

Mr. BRYN.—It is a French word for "good luck."

Q. How do you know that the "Brazil" was

(Testimony of F. W. Kutter.)

owned by Gangerrolf? Lloyds shows the "Brazil" under Aktieselskapet Bonheur.

A. The "Brazil" is not classed under Lloyds. She is carried in the Norwegian Veritas, which says Gangerrolf is the owner.

Q. Let me ask you this: When was the "Brazil" built?

A. I could not say. I think about 1915 or 1914.

Q. 1914? A. 1914 or 1915, I don't know which.

Q. What is her gross tonnage?

A. I have not the exact figures in my head.

Q. She is a twin screw, isn't she? A. Yes.

Q. Oil engines? A. Deissel motors.

Q. They are oil engines?

A. That is what they classify them, oil engines.

Q. And the "Bayard" also is twin screw, and classified as oil engines? A. Yes.

Q. The "Bayard" was built in 1915?

A. Yes.

Q. Did you say what the gross tonnage of the "Brazil" was?

A. I don't recall it; I have not the figures in my head.

Q. Do you know approximately? Is it over 3000?

A. The gross tonnage?

Q. Yes. A. Yes.

Q. Is it over 3000 tonnage? A. Yes.

Q. Now, when did you get from Fred Olsen &

(Testimony of F. W. Kutter.)

Co.—the "Brazil" entered here November 13th, didn't she?

A. That is according to the records. I have not the dates clear in my head; sometime in November.

Q. When did you get permission as to the "Brazil," to sign this agreement that she would return to port, from Fred Olsen & Co.?

A. The charter of the "Brazil" was made up at the same time as [89] the "Bayard's."

Q. They were made up at the same time and submitted at the same time? A. Yes.

Q. How was the "Bayard" occupied between December 21 and early January?

A. How was she occupied? Q. Yes.

A. Getting ready for the voyage, I suppose—laying idle getting ready for the voyage. If I recall correctly our agreement with the charterers, they were not to take her until a certain date in January.

Q. Did you have no opportunity to charter her earlier than that? A. Earlier than what?

Q. Earlier than January? That voyage began on January 17th and the repairs were completed December 21. I understand there was a great demand for vessels.

A. We could not negotiate for a charter while the vessel was under repairs, not knowing just when she would be ready.

Q. Did you have to wait until the repairs were absolutely completed?

A. We would. We could not tell when the vessel would be completed.

(Testimony of F. W. Kutter.)

Q. Getting back to this, I want to know whether you are perfectly certain as to the matter of ownership. You are relying on the Norwegian Veritas as to what the ownership is?

A. The Norwegian Veritas shows Gangerrolf is the owner; I don't know whether that is correct or not. They are different companies as far as I remember—they are two different companies.

Q. There is the same managing owner?

A. Yes.

Mr. FRANK.—You do not contend that one managing owner could not manage half a dozen different companies?

Mr. GRIFFITHS.—No. My theory of the case is this, that there was trouble on between the owners and the War Trade Board, and that accounts for the identity of dates.

Q. Now, Mr. Kutter, I think I understood you to say that early in November the shipping board was not interfering very much with [90] charters. What do you mean by the words "very much"?

A. They were not as strict as they are at the present time.

Q. You proposed to submit this particular charter with Mr. Moore to the shipping board, didn't you? A. We did.

Q. And you understood that you would have to have the approval of the shipping board of that charter before the vessel could sail?

A. That was the general understanding, that all

(Testimony of F. W. Kutter.)

the charters were to be submitted to the shipping board for their approval.

Q. And that any charter, except one for your own account, would have to be submitted to the shipping board for approval?

A. If I remember correctly that is the way it was.

Mr. FRANK.—That is our case. Have you got any other testimony, Mr. Griffiths?

Mr. GRIFFITHS.—Not here. I want to take the deposition of J. B. Smull, who is a member of the charter committee of the United States Shipping Board in New York.

Mr. FRANK.—Now, let me make a suggestion. I want to bring this case to an issue now. From the suggestion made this morning by Mr. Griffiths, I consider that what he proposes to prove is utterly immaterial. If he will state what he proposes to prove we can determine that now, and not have the delay or the expense of going away and taking these depositions. I suggest that you give us now what it is you propose to prove by this man.

Mr. GRIFFITHS.—I want to take the testimony of J. P. Smull, a member of the charter committee of the United States Shipping Board, Custom House, New York, who will testify that the committee and the shipping board would not have approved a lump-sum charter any time between November 3rd and December 21, 1917, and before and after,

and would only have approved a time charter not to exceed 45 shillings per dead weight ton per month. We have got the testimony of Mr. Kutter himself that all the charters had to be submitted for approval. [91]

Mr. FRANK.—We will argue the case afterwards. The way it appeals to me is this, that this man cannot say what he would or would not have done; what he did is of record. To turn around and now say at some previous date he would not have done a certain thing is rather, I think, out of order. I do not think that would be material testimony. In fact, there is not a single man that had the say of it at all; it is a committee. The testimony here is to the effect that there were charters that were made at that time and were approved at that time, and unless there was some particular peculiar thing that had to do with a particular vessel under particular circumstances as a matter of course it would be approved. It is a question of what was done, and not of what would be done. We can only judge of what would be done by what was done. This sort of business, as to what he would not have done at such and such a time, I do not think is proper.

Mr. GRIFFITHS.—The "Dicta" was the only Norwegian vessel in Mr. Page's list and her charter was a time charter, not a lump-sum charter at all.

Mr. FRANK.—If you think you have any advantage in that we will argue that, but this is addressed to the proposition of taking a man's testimony that

he would not have done such a thing at a certain time in the past.

Mr. GRIFFITHS.—I do not see how else we can get at it. All I want to do is to get at the truth about this demurrage. If you are entitled to demurrage when the ship was free to sail, all right; but if, according to the general impression, the Norwegian vessels at that time were tied up by reason of some difficulty between the American Government and the Norwegian owners, and we can get at that, I want to know it. I do not think that a vessel should be rewarded by heavy demurrage for her reluctance, or the refusal of her owners to comply with demands of the United States Government [92] in these war times.

Mr. FRANK.—That is all true enough, so far as that is concerned, but the shipping committee had nothing to do with any difficulty that might have arisen between the United States Government and the Norwegian Government. That is entirely a matter of the State Department. I am not attempting to deprive you of any testimony that is material or any testimony that is proper, but I do not want to be driven to the expense of going to New York to take testimony that will prove to be utterly immaterial and not to be considered by the Court. I would like to submit that proposition to the Court for a ruling upon the offer that is now being made, before we go any further.

The COURT.—What is the offer—that it is to prove by this witness Smull that the board was not approving, had not approved, and would not ap-

prove of lump-sum charters for Norwegian vessels that you have just named?

Mr. GRIFFITHS.—No, broader than that. I will repeat it in just exactly the words I stated: To prove by J. B. Smull, a member of the charter committee of the United States Shipping Board at the Custom House at New York, that the committee and the shipping board would not have approved a lump sum charter any time between November 3d, 1917, and December 21, 1917, and before and after, and would only have approved of time charters at not exceeding 45 shillings per dead weight ton per month.

The COURT.—And was not approving other charters?

Mr. GRIFFITHS.—That I cannot say. This is the statement of proof to be made that I have just stated. Of course, I am perfectly willing for Mr. Frank's representative there upon this deposition to go into it thoroughly. All I want to know is whether that boat was free to sail. If it was, that is the end of the story. I do not believe that it was. [93]

Mr. FRANK.—I am making my objection to your offer.

The COURT.—I would prefer that your proof should include both as to whether they had approved during this period time charters—as to whether they had not approved or had refused to approve them, covering all cases during that period in regard to charters of this kind.

Mr. GRIFFITHS.—The broader it is the better I would like it.

The COURT.—If they were approving charters for other vessels, to say they would not approve the charter for this vessel, of course, would not prove much. What time will that take?

Mr. FRANK.—That is all the testimony you have?

Mr. GRIFFITHS.—That will finish our case.

Mr. FRANK.—Let it be put over four weeks.

The COURT.—Very well.

[Endorsed]: Filed June 20, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [94]

[Title of Court and Cause.]

(No. 16,303.)

(Deposition of Frederick Johan Ellertsen, a Witness Called on Behalf of Libelant.)

BE IT REMEMBERED that on Monday, January 14, 1918, pursuant to stipulation of the counsel hereunto annexed, at the office of Nathan H. Frank, Esq., in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc. Frederick Johan Ellertsen, a witness called on behalf of the libelant.

Nathan H. Frank, Esq., appeared as proctor for the libelant, and F. P. Griffiths, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of [95] the libelant at the office of Nathan H. Frank, Esq., in the Merchants Exchange Building, in the city and county of San Francisco, State of California, on Monday, January 14, 1918, before Francis Krull, a United States Commissioner for the Northern District of California and in shorthand by E. W. Lehner.

It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.) [96]

(Deposition of Frederick Johan Ellertsen.)

FREDERICK JOHAN ELLERTSEN, called for the libelant, sworn.

Mr. FRANK.—Q. What is your age, Mr. Ellertsen? A. Twenty-nine.

Q. What is your occupation?

A. Now it is first officer, but at the time of the collision it was second officer.

Q. You were second officer of the "Bayard" at the time of the collision? A. Yes.

Q. And now first officer of the "Bayard?

A. Yes.

Q. The "Bayard" was at anchor out in the bay?

A. Yes.

Q. What had she been doing before she went out in the bay?

A. She was discharging cargo at the sugar refinery.

Q. How long before the collision was it that she had gone out into the bay and come to an anchor?

A. The same day.

Q. At the time of the collision were you on deck?

A. Yes, I was on deck.

Q. Did you observe your lights? A. Yes.

Q. I mean your anchor lights?

A. Yes, just before the collision I observed the lights.

Q. What was their condition?

A. They were burning bright.

(Deposition of Frederick Johan Eliertsen.)

Q. How were they hung? In places fixed specially on the vessel?

A. Yes, fixed places, fixed by falls and halyards.

Q. What is the height of the funnel?

A. The forward one is 38 feet and the after one 17 feet.

Q. Above the deck? A. Above the deck.

Q. Is that above the deck or above the water?

A. No, above the deck.

Q. After the "Beaver" collided with you, state whether or not she swung?

A. She caught under our starboard anchor chain and went full speed astern, and the tide, with her going full speed [97] astern, made her swing against our starboard side.

Q. Did she do any damage then?

A. Yes, she smashed our accommodation ladder.

Q. I understand she ran under your anchor chain? A. Yes.

Q. Did the vessels drift?

A. Yes, when she went full speed ahead, our anchor lost its grip in the ground, on the bottom, and she started to drift—both the vessels.

Q. After they had been brought up and the "Beaver" had left you, did you employ any tugs to take you back to your anchorage?

A. We had been laying at a safe anchorage before and we had to order a tug to take us back again. We drifted out into the fairway.

Q. You drifted out into the fairway?

(Deposition of Frederick Johan Ellertsen.)

A. Yes, toward Goat Island.

Q. At the time of taking you back, state whether or not there was a hawser that was injured or damaged belonging to your vessel?

A. Yes, there was a hawser, manilla rope, that was badly strained.

Q. Where did she strike you?

A. On the starboard bow.

Q. Did considerable damage, did she?

A. Considerable damage, yes.

Q. When are you going to sea?

A. I expect on Thursday.

Q. She has been fully repaired and is ready to go to sea? A. Yes.

Q. How was the atmosphere at the time of this collision?

A. It was quite visible, clear; you could see the lights ashore; we could see the Ferry Building and we could see the lights of the anchored steamers laying all around.

Q. How about the other side, the Oakland side?

A. Yes, there were lights, too.

Q. You could see lights there?

A. We could see the lights, [98] the cable crossing lights.

Q. Did you see the "Beaver" when she first left her dock?

A. I saw her immediately before she struck, a few minutes before.

(Deposition of Frederick Johan Ellertsen.)

Cross-examination.

Mr. GRIFFITHS.—Q. What is the length of the "Bayard"?

A. I believe it is 338 feet; I couldn't exactly say her measurements, but I believe it is that.

Q. You know it was over 150 feet? A. Yes.

Q. What is her beam?

A. It would be about 40, something like that.

Q. And her draft?

A. Her draft loaded is 21 feet.

Q. Where was the forward light hung? You say you had a regular place for it. Where was that place? A. On the stay.

Q. On the stay? A. Yes.

Q. Where was the after light hung?

A. On the flag pole aft.

Q. That was right at the stern? A. Yes.

Q. What kind of lights were they?

A. They were anchor lights burning kerosene.

Q. What color? A. White.

Q. How long before the collision had you noticed the lights particularly?

A. Just before she struck, about a minute or two before she struck.

Q. When had they last been filled with oil, do you know? A. Every night.

Q. Had they been filled that night? A. Yes.

Q. What was the time of the collision?

A. Seven-thirty.

Q. And when had they been set?

A. At sunset.

(Deposition of Frederick Johan Ellertsen.)

Q. Had they been set under your direction?

A. No.

Q. Who had put them up?

A. The boatswain put them up.

Q. The boatswain? A. Yes, sir. [99]

Q. Did you have a watch on deck at the time of the collision?

A. Yes, we had a watch on deck.

Q. Who was it? A. The boatswain.

Q. What is his name? A. T. Pentland.

Q. Do you know where he is now?

Mr. FRANK.—That is immaterial. We will produce him when the time comes.

Mr. GRIFFITHS.—Is he by the boat now?

A. Yes, he is by the boat now?

Q. Where is the "Bayard" now?

A. Pier 39.

Q. What is she doing there?

A. Taking in cargo.

Q. Where were the repairs completed?

Mr. FRANK.—You have all that, Mr. Griffiths; she was repaired under an agreement between us at the Union Iron Works; all that detail is a matter of agreement between us.

Mr. GRIFFITHS.—I know you had an agreement for repairs but I didn't know when the repairs were completed. That would not show in the agreement.

Mr. FRANK.—That would not show in the agreement. If he knows. There will be no dispute between us as to that.

(Deposition of Frederick Johan Ellertsen.)

Mr. GRIFFITHS.—How long has she been loading? A. She is loading now.

Q. How long has she been loading?

A. She came down to San Francisco the day before yesterday, Friday, and she has been lying up at Point San Pablo a couple of days loading oil.

Q. Deck oil? A. Deck oil.

Q. Did you have a lookout at the time of the collision? A. I was standing on deck.

Q. You were standing on deck? A. Yes, sir.

Q. No one else? A. Not that I know of. [100]

Q. Where were you stationed; whereabouts on the deck? A. On amidships.

Q. Amidships? A. Yes.

Q. Were you the only man on deck at the time?

A. I couldn't say that.

Q. How long before the collision did you observe the "Beaver"? A. Just a few minutes before.

Q. Did you do anything to attract her attention to your presence?

A. No; there were lights all over the ship; there was a big cluster at the gangway and all the lights in the rooms were lighted.

Q. And how long had you been anchored there at the time of the collision?

A. She came out there the same day.

Q. She was anchored the same day as the collision? A. Yes.

Q. How was the tide running at the time?

A. Ebb tide, pretty strong.

(Deposition of Frederick Johan Ellertsen.)

Q. Strong ebb? A. Yes.

Q. Do you know of any damage to the machinery of the "Bayard"? A. I couldn't say.

Q. Who was the owner of the "Bayard"?

A. Fred Olsen of Christiania; I think the company is the Aktieselskapet Bonheur.

Mr. FRANK.—Q. Fred Olsen is the manager?

A. The manager.

Mr. GRIFFITHS.—Q. Do you know whether that company is also the owner of the "George Washington"? A. I don't think it is. [101]

United States of America, State and Northern District of California, City and County of San Francisco,—ss

I certify that, in pursuance of stipulation of counsel on Monday, January 14, 1918, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the office of Nathan H. Frank, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared Frederick Johan Ellertsen, a witness called on behalf of the libelant in the cause entitled in the caption hereof; and Nathan H. Frank, Esq., appeared as proctor for the libelant, and F. P. Griffiths, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by E. W. Lehner, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof was expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the Clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the [102] cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 24th day of May, 1918.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed May 24, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [103]

[Title of Court and Cause.]

No. 16,303.

(Deposition of Oliver Pehr Rankin, for Claimant.)

BE IT REMEMBERED: That on Friday, May 10, 1918, pursuant to notice of counsel hereunto annexed, at the offices of McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared before me, Thomas E. Hayden, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc., Oliver Pehr Rankin, a witness called on behalf of the claimant.

Nathan H. Frank, Esq., appeared as proctor for the Libelant, and F. P. Griffiths, Esq. appeared as proctor for the claimant, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the claimant at the offices of McCutchen, Olney & Willard, in the Merchants Exchange Building, in the city and county of San Francisco, State of California, on Friday, May 10th, 1918, before Thomas E. Hayden, a

(Deposition of Oliver Pehr Rankin.)

United States Commissioner for the Northern District of [104] California, and in shorthand by Wm. Barnum.

It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to the materiality and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.)

Mr. GRIFFITHS.—I would like to have the record show before the Commissioner leaves that the deposition is taken at six o'clock, and that we have waited in the meantime while Mr. Irving Frank communicated with Mr. Nathan Frank, who will come here as soon as he can.

Mr. NATHAN FRANK.—That was about quarter to five.

Mr. GRIFFITHS.—That is, the notice of the deposition was served at a quarter to five for 5:15.

Mr. FRANK.—Well, I think that will be all right.

Mr. GRIFFITHS.—The usual stipulation, Mr. Frank.

Mr. FRANK.—Yes. [105]

(Deposition of Oliver Pehr Rankin.)

OLIVER PEHR RANKIN, called for claimant, sworn.

Mr. GRIFFITHS.—Q. You are now a member of the Naval Reserves, are you? A. I am.

Q. Have you received a call to service today?

A. I have.

Q. When do you have to leave San Francisco?

A. Immediately.

Q. That is you are leaving when?

A. The words of the order are "immediately."

Q. When are you actually leaving?

A. On the 11 o'clock train to-night.

Q. Were you master of the steamer "Beaver" on November 3, 1917? A. I was.

Q. Did you leave on that day for a voyage to Portland. A. We did.

Q. From what dock, as you left San Francisco, did you leave? A. Pier 40.

Mr. FRANK.—Was it Pier 40 or 30?

A. Pier 40.

Mr. FRANK.—It is Pier 30 in your answer.

Mr. GRIFFITHS.—Are you certain about the pier? A. Absolutely certain.

Q. Absolutely certain it was pier 40? A. Yes.

Q. Were you headed in the pier?

A. Yes, head in.

Q. How did you come out. A. Backed out.

Q. What time did you back out?

A. About 7 P. M.

Q. What would you say of the tide at that time?

A. Strong ebb.

(Deposition of Oliver Pehr Rankin.)

Q. Do you recall when the end of the ebb was?

A. It had about two hours to run I think.

Q. As you backed out from the pier how did your vessel move, what was your movement?

A. The stern was carried rapidly with the flow of the tide.

Q. How were your engines working?

A. The engines were working full speed.

Q. Astern? A. Yes. [106]

Q. That is, you backed off in what general direction?

A. The tide governs the direction; in this case to the northwest.

Q. How far to the northwest did you back from pier 40?

A. That is the approximate direction, that northwest.

Q. Yes, I understand that. A. I backed until the ship was approximately *alinged* with the piers.

Mr. FRANK.—You mean vertical with the pier.

Mr. GRIFFITHS.—You mean parallel with the piers? A. With the face of the line of the piers.

Q. Then what did you do captain?

A. Came ahead full speed, with the helm hard astarboard.

Q. What was the purpose of moving her hard astarboard?

A. To execute the swing to the left, a left-hand semi-circle.

Q. That got your vessel on what course?

A. Head outward.

(Deposition of Oliver Pehr Rankin.)

Q. Toward the Gate. A. Toward the Gate.

Q. Did you observe any vessel anchored to your port as you swung around to her starboard helm?

A. I did.

Q. What was the vessel?

A. The "George Washington."

Q. Do you recall approximately where she was anchored with reference to the piers?

A. About off 30 or 32, I think.

Q. What course did you take with reference to her?

A. I went around her, leaving her on my port side, the left-hand side.

Q. Were you still on your hard astarboard helm?

A. Yes, sir.

Q. What next happened captain, after you cleared the "George Washington?"

A. I saw the loom of another vessel on the port bow.

Q. About how many points off your port bow, if you recall? A. I should say roughly, a point.

Q. That was the vessel which afterward turned out to be the "Bayard"? A. Yes.

Q. What orders did you give upon seeing the loom of this vessel?

A. Ordered the helm aport, and reversed the engines full speed. [107]

Q. Did you see any lights on the "Bayard" before observing her loom? A. No.

Q. What was the state of the atmosphere on this occasion? A. Hazy, with passing fog.

(Deposition of Oliver Pehr Rankin.)

Q. Were you on the bridge of the "Beaver" when you left the pier? A. I was.

Q. Did you remain there continuously until the accident? A. I did.

Q. Who else, if anyone, was on the bridge?

A. The third officer.

Q. What was his name? A. Rader.

Q. What, if any, lookout did you have posted?

A. An able seaman in the bow.

Q. On the end of the ship, or where?

A. On the forecastle head.

Q. Did you receive any reports of lights from the "Bayard" from the third officer? A. No sir.

Q. Did you from your lookout on the forecastle-head? A. No sir.

Q. What lights did you have on the "Beaver"?

A. The regulation running lights; green light to starboard, red light to port; white mast-light on the foremast, with the range light on the main mast.

Q. What occurred after you put your helm aport and reversed your engines upon observing the loom of the "Bayard"?

A. The ship continued her swing against the helm and did not immediately respond to her port helm.

Q. Why not.

A. On account of the momentum she had already gotten and the heavy tide that was running, strong tide.

Q. Did collision ensue? A. It did.

Q. How did the vessel strike?

(Deposition of Oliver Pehr Rankin.)

A. Head on, almost directly.

Q. You hit the "Bayard" almost head on?

A. A little on the starboard bow, close to the stem.

Q. What happened to your vessel?

A. The two vessels swung together, our port-side against her starboard side.

Q. Describe what you did then?

A. We allowed our engines to continue back full speed until our headway was destroyed; we [108] backed clear. In the meantime I ascertained what ship it was. After the collision we asked him if he required assistance and he said he did not.

Q. Then what did you do?

A. Backed clear. It was reported to me our steering gear was out of order.

Q. You mean after the collision?

A. After the collision.

Q. Then what did you do?

A. I brought the ship to anchor in order to make investigation.

Q. Captain, assuming that the anchor lights of the "Bayard" were displayed on that occasion how can you explain your failure to observe them before observing the loom of the vessel?

A. By a passing patch of fog over the "Bayard" or by an eclipse of her lights by the "George Washington," which lay between the "Beaver" and the "Bayard" as we were swinging.

Q. How long did it take you after you came around the "George Washington" to get to the "Bayard"?

(Deposition of Oliver Pehr Rankin.)

A. I would judge a minute and a fraction thereof.

Q. How long have you been going to sea, Captain? A. Since December, 1900.

Q. How long have you held master's papers?

A. I think since 1906.

Q. How long have you been master of the "Beaver"? A. Since April 7, 1917.

Q. What other vessels had you had command of before that time? A. The "Rose City."

Q. For how long? A. About five years.

Q. Any other vessels? A. Not as master.

Q. Have you ever been involved in a collision before as master? A. Never.

Q. Captain, before leaving the dock on that evening did you take any observations with reference to anchored vessels in the Bay, or as to conditions of the Bay, or not?

A. I did, from the end of the pier.

Q. You went out to the end of the pier for that purpose? [109] A. Yes.

Q. Did you observe the lights on the "Bayard"?

A. I saw lights I concluded must have been the "George Washington's" lights.

Q. Did I ask you when you received your notice to report in the Naval Reserves?

A. You did not.

Q. When did you receive your notice?

A. At 11 A. M. to-day.

Q. You are a Lieutenant Commander in the Naval Reserves.

(Deposition of Oliver Pehr Rankin.)

A. Under orders in the Naval Reserves; orders to report to Portland, Oregon.

Q. From whom did your orders come?

A. From the supervisor for the Naval Auxiliary.

Q. You are now a lieutenant commander in the Navy? A. In the Naval Reserve Forces.

Cross-examination.

Mr. FRANK.—Q. Did I understand you to say you went out at full speed? A. Yes sir.

Q. You were proceeding at full speed at the time you first caught sight of the "Bayard"?

A. Yes.

Q. And you changed your engines to full speed astern when the collision was imminent, when you knew the collision was imminent: Is that right?

A. When I saw this vessel I reserved the engines full speed.

Q. When you saw her you knew the collision was imminent, didn't you? A. Yes.

Q. Did I understand you to say that it was the fog that hid the vessel from you?

A. Not directly so.

Q. What do you mean by that answer?

A. That I am not sure that it was the fog, or if it was an eclipse of the lights by this other ship.

Q. At any rate according to your present testimony you were sensible of the fact if there was a fog that must have been the cause of it? A. Yes.

Q. When you started to leave the dock, what was your position [110] on the deck of the vessel. A. On the bridge.

(Deposition of Oliver Pehr Rankin.)

Q. Did you leave the bridge at any time?

A. I did not, not prior to the collision.

Q. Was the lookout that you spoke of in the bow of the vessel the only lookout that you had?

A. Excepting the third officer.

Q. Where was he? A. On the bridge.

Q. On the bridge with you? A. Yes.

Q. Then you had no other person acting as lookout except the man in the forecastle-head?

A. No.

Q. What other men were on the hurricane deck, or on the bridge?

A. The quartermaster, if not at the wheel, was busy with the incidentals around the bridge.

Q. That was all that were on the deck?

A. You said hurricane deck.

Q. Yes. A. The chief officer was there.

Q. Also on the bridge?

A. He came on the bridge.

Q. When?

A. Just as we were about to strike the ship. The sailors were engaged about the decks securing the cargo again.

Q. Does that account for the whole crew?

A. The second officer was aft.

Q. Where was he?

A. In the after end of the upper deck.

Q. What do you mean by the upper deck, the hurricane deck? A. Yes.

Q. What was he doing?

A. That is his position on leaving the dock.

(Deposition of Oliver Pehr Rankin.)

Q. What was he doing, what was his purpose here?

A. Superintending the sailors who were hanging the lines out.

Q. Now, have you accounted for everybody?

A. The carpenter was on the forecastle-head.

Q. Is that all?

A. That accounts for the deck crew, with the exception of the man at the wheel.

Q. And that was the position of these people when you started to back out of the dock and during the time you were backing out? [111]

A. Yes.

Q. And also during the time you were going forward up to the time of the collision? A. Yes.

Q. Did you observe any other vessels besides the "George Washington" there? A. No.

Q. Wasn't there a third vessel out there?

A. I had seen several more out there in the day time before dark, further to the southeast.

Q. None to the northward of the "Bayard" or the "Washington"?

A. I don't remember; there was a couple of scows at work on the submarine cable between Goat Island and the mainland. I noted her presence out there.

Q. Where was she located with reference to these vessels?

A. I imagine she was about midway across.

Q. Just indicate with a letter "A" what you consider to be pier 40, what you understand to be pier 40? A. Yes; this is pier 40.

(Deposition of Oliver Pehr Rankin.)

Q. Put the "A" off to the end, mark it there: That would be right, would it? A. Yes.

Q. Now indicate where in your opinion the "George Washington" lay with the letter "B."

A. You wish it to face you?

Q. Mark it "G. W." instead of "B"?

A. Yes.

Q. Indicate in your opinion where the "Bayard" was; indicate that with a letter "B"? A. Yes.

Q. Where was the barge that you recollect?

A. The cable barge I think was in this locality.

Mr. FRANK.—We will call that "C. B."

Q. Now just indicate about what your course was —before you made that heavy mark—did you strike her end on?

Mr. GRIFFITHS.—He said practically head on —those are the words he used in the deposition.

Mr. FRANK.—Q. You think you struck her head on; as that is indicated by the line running out from "A" over to the [112] object "B"?

A. Practically head on.

Mr. GRIFFITHS.—Q. What do you mean by that qualification? A. It was so near that——

Q. (Intg.) What do you mean was practically head on, to which side was it more than the order, was it more on the port or starboard?

A. I think the fore and aft lights of the ship were practically coincident then. I know of no term to better express it.

Mr. FRANK.—Q. If that is so, and you were swinging on a starboard helm, which would have

(Deposition of Oliver Pehr Rankin.)

thrown you on the starboard side of that vessel, why did you port your helm, which would have counteracted your starboard swing?

A. There was not enough room to clear by continuing on the starboard helm between ourselves and the "Bayard" with the strong ebb tide.

Q. What was the reason you reversed to port?

A. By continuing with the starboard helm we would have sunk the "Beaver"; so we lay ourselves broadside across the stream of the "Bayard."

Q. That would have scraped across the bow?

A. It would have been a most awful kind of a blow. It would have ripped her side out. The only solution in getting away was porting the helm hard aport.

Q. I understand the same thing from the position you have placed on this map, you would have hit the "Bayard" whether you were port or starboard, according to this you were coming directly forward, you were on a port swing, were you not, when you first sighted her?

A. As we trimmed her from starboard to port.

Q. And threw your vessel to port? A. Yes.

Q. When you have thrown your wheel to port you had to counteract that swing before you got any effect upon your vessel, so then wouldn't it have been a better way to go on the port-side instead of the starboard?

A. We could not have done it; there was no room?

Q. Why.

(Deposition of Oliver Pehr Rankin.)

A. Because of the strong ebb tide; that absolutely [113] precluded any possibility of our clearing her that way.

Q. Why didn't it have the same effect on the other side?

A. Because it was setting us down toward the ship all the time; it was setting right against her bow, right across her bow.

Q. This theory of the manner in which you were approaching her is the result of the quick observation that you made just before the collision, is it not; you have nothing else to base it upon, with reference to your position, as to the direction in which you were approaching the "Bayard," when you first saw her?

A. We were heading—we would hit—

Q. (Intg.) I don't want to argue the matter with you. We are trying to get your statement of the facts as you observed them, not your conclusions as you are trying to give now.

Mr. GRIFFITHS.—Let the witness answer.

Mr. FRANK.—Q. Read the question.

(Last question repeated by the Reporter.)

A. No.

Q. What is it based on?

A. I had an idea of direction from the loom of the lights of the San Francisco water front, as well as our own compass.

Q. Your compass wouldn't serve to fix the direction with relation to the position of the "Bayard" at all, would it?

(Deposition of Oliver Pehr Rankin.)

A. By giving us our own heading.

Q. What was your compass direction?

A. It was approximately northwest.

Q. When did you take the observation upon which you base that statement?

A. I don't know what she was showing by compass.

Q. You were swinging?

A. We were swinging. I know she was going around on a course on which we were going to steady her.

Q. You know that, as you say, simply from the loom of the lights of the city? A. Yes.

Q. Nothing accurate about that, is there, captain?

A. Very approximate. [114]

Q. As a matter of fact, are you certain that you went around the bow of the "George Washington" instead of going around her stern?

A. Positive I went around her bow.

Q. How close did you pass her on her bow?

A. That would be very approximate.

Q. Your best judgment; you have given other distances here.

A. About two or three ship lengths; two ship lengths probably.

Q. What do you call a ship's length?

A. 400 feet, 450 feet.

Q. You think you passed her from 800 to 1,200 feet, from her bow?

A. We were setting down on her bow all the time,

(Deposition of Oliver Pehr Rankin.)

we were passing, so the distance was not remaining constant.

Q. The distance would be constant the moment you were opposite her bow: How far do you think that was?

A. About two ship's lengths.

Q. About 800 feet? A. Yes.

Q. How long was it after you passed her bow before you saw the "Bayard"?

A. A fraction of a minute.

Q. How far was the "Bayard" off, to your best judgment? A. About three ship lengths.

Q. About 1,200 feet?

A. Not that much; possibly between two and three ship lengths.

Q. You are not sure of the distance? A. No.

Q. It might have been only 800 feet, and it might have been even less?

A. It might have been 800 feet—wait a minute, at what time?

Mr. FRANK.—Read the question to him.

(Question repeated as follows: "How far was the "Bayard" off to your best judgment.")

Q. (Contg.) When you passed the bow of the "George Washington"?

A. Or at the time of sighting the "Bayard"—about two ship lengths.

Q. How far was the "Bayard" off, to your best judgment, from the "George Washington"?

A. About three-eighths of a mile. [115]

Mr. GRIFFITHS.—Q. That is measuring from

(Deposition of Oliver Pehr Rankin.)

the stern of the "George Washington" or from her bow?

A. Have you a pair of dividers here?

(Measuring on the diagram.)

Mr. FRANK.—Q. You are measuring there, you don't assume that those diagrams on the map are correct?

A. To the best of my judgment.

Q. They are not laid down to any scale at all; it is just an eye judgment from the map, is it not?

A. Not the "George Washington's" position.

Q. What have you got to fix the position accurately? You see the trouble is what I am trying to get from you is the actual positions of the vessels here, and you are arguing from the diagram that you have drawn.

Mr. GRIFFITHS.—Q. How do you place these ships?

A. By sextant angles; horizontal sextant angles, from the pier heads.

Mr. FRANK.—Q. When did you do that?

A. The day following the collision.

Q. You have not undertaken on the map here to locate by that measurement?

A. I have here; the "George Washington."

Mr. GRIFFITHS.—You see the intersection of lines.

A. (Contg.) I place the "Washington" right between this intersection of lines.

Mr. GRIFFITHS.—Q. Have you had this drawing before? A. I have.

(Deposition of Oliver Pehr Rankin.)

Q. When did you have it?

A. Immediately following the collision.

Q. Those fine lines that you just referred to, were they made by you? A. They were.

Q. How were they made?

A. As the result of a position obtained from horizontal sextant angles from the pier head.

Mr. FRANK.—Q. After the collision?

A. Yes. [116]

Q. That would not be true with reference to the "Bayard" because she was moving?

A. It would not be true of the "Bayard"; it would not be true for the "Bayard's" position at the time of the collision.

Q. The only thing you are drawing now is that the "George Washington's" location on this map is in accordance with the measurement you made on the map at some previous time?

A. This is the position of the "Bayard" following the collision.

Mr. GRIFFITHS.—Mark that "B–2."

Mr. FRANK.—Q. This position "B–2" of the "Bayard" that you put on this map is only approximate? A. Yes.

Q. You have no data upon which it is based?

A. No, sir..

Q. You say at that time she was about three-eighths of a mile from the "George Washington"?

A. Approximately; that is my judgment.

Q. What time was it you were out at the end of the pier observing locations of vessels out there?

(Deposition of Oliver Pehr Rankin.)

A. About 15 minutes prior to departure.

Q. Of what vessel? A. Of the "Beaver."

Q. Was it foggy at that time?

A. Hazy, with indications of denser haze or light fog on the eastern section of the Bay.

Q. Couldn't you see lights on the eastern section of the Bay? A. No, sir.

Q. You could not? A. Could not, no, sir.

Q. Was it dark when you made that observation?

A. It was dark.

Q. How long had it been dark?

A. About one hour.

Mr. GRIFFITHS.—It was before the Day-light Saving Bill went into effect.

The WITNESS.—(Contg.) That, of course, was a guess again. We could get that very readily from the tables. I imagine it gets dark about a quarter to six at that time of the year.

Mr. FRANK.—Q. Well, you know it had been dark for sometime, anyway? A. It had, yes.

Q. You knew when you swung out from the pier that there was a [117] strong ebb tide, didn't you? A. Yes.

Q. In fact, you knew it before you started?

A. Yes.

Mr. FRANK.—This map can be marked "Exhibit A." It can be considered as in evidence. We will retain it to pass between us.

Mr. GRIFFITHS.—Yes.

Redirect Examination.

Mr. GRIFFITHS.—Q. Captain, why did you

(Deposition of Oliver Pehr Rankin.)

come out with your engines full speed astern?

A. To prevent sagging down on the south corner of Pier 38.

Q. On account of the strong ebb? A. Yes.

Q. So were you under full speed when you got her headed around, going ahead?

A. In order to make our handle.

Q. Will you explain that a little more fully?

A. A ship develops her best rudder power in going full speed ahead.

Q. The "Beaver" is a passenger steamer?

A. Yes.

Q. Did you have passengers on board on this occasion? A. We did.

Q. When you describe the atmosphere as foggy, was it a settled or a patchy fog?

A. Patchy fog, or a passing fog, as I described it before, later on becoming denser.

Q. Could you see the lights on the Oakland side of the Bay? A. No sir,—at what time?

Q. As you were coming down the Bay, after getting around the "Washington"?

A. I didn't notice them; I would have no occasion to look in that direction then.

Recross-examination.

Mr. FRANK.—Q. You would not have time either, would you, this happened so quickly?

A. No.

Q. With that strong ebb tide running, why didn't you give the "George Washington" a berth?

A. I considered the "George Washington"; I

(Deposition of Oliver Pehr Rankin.)

gave her sufficient; I knew there were some [118] barges anchored to the southeast.

Q. You could have given her a much wider berth without coming into the neighborhood of those barges, couldn't you? A. I don't know.

Q. In fact, the barges without having been an obstruction, you could have gone southward and around them too, could you not?

A. By so doing I would have run a chance of losing the lights on the San Francisco side, which are a guide in finding one's way out in hazy weather.

Q. Is that the only reason that you can offer?

A. I also knew that the barge was at work on the cable; I wished to go between the San Francisco side and the barge.

Q. Why didn't you go further out in the bay?

A. As I say, you learn the position of your ship by the lights, the Frisco lights.

Q. You have a compass and know the Bay sufficiently?

A. Not sufficient to indicate—the compass is not sufficient to navigate the Bay in hazy weather with an ebb tide.

Q. Don't ferry-boats do it every day, very many days in the year, and don't vessels do it, go in and out in foggy weather: You have no lights in the daytime; if you travel in foggy weather how do you go out?

A. In the case of ferry-boats and the loaded "Beaver" with an ebb tide, I don't think it is parallel.

(Deposition of Oliver Pehr Rankin.)

Q. How do you go out in the day-time?

A. I wouldn't go out in foggy weather in an ebb tide.

Q. Only at night-time?

A. Not in a dense fog then; not at any time with a fog. [119]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of notice of counsel, on Friday, May 10, 1918, before me, Thomas E. Hayden, a United States Commissioner for the Northern District of California, at San Francisco, at the offices of McCutchen, Olney & Willard, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared Oliver Pehr Rankin, a witness called on behalf of the claimant in the cause entitled in the caption hereof; and Nathan F. Frank, Esq., appeared as proctor for the Libelant, and F. P. Griffiths, Esq., appeared as proctor for the claimant, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereunto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by W. H. Barnum, and thereafter reduced to typewriting; and I further certify that by stipulation of the

proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof were expressly waived.

Accompanying said deposition and referred to and specified therein is Libelant's Exhibit "A."

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the Clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named [120] in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 23 day of May, 1918.

THOMAS E. HAYDEN, (Seal)
United States Commissioner, Northern District of California, at San Francisco. [121]

[Title of Court and Cause.]

No. 16303.

Notice of Taking Deposition De Bene Esse

To Aktieselskapet Bonheur, a corporation, libelant, and to Messrs, Nathan H. Frank and Irving H. Frank, Its Proctors:

You and each of you will please take notice that ——Rankin, a witness on behalf of claimant herein,

San Francisco & Portland Steamship Company, a corporation, whose testimony is necessary in the cause above named, and who is bound on a voyage to sea and is about to go out of the United States and out of the district in which the cause is to be tried and to a greater distance than one hundred miles from the place of trial before the time of trial, will be examined *de bene esse* on the part of the said claimant before Thomas Hayden, United States Commissioner, in and for the Northern District of California, not being of counsel or attorney to either party nor interested in the event of the cause, at the offices of Messrs. McCutchen, Olney & Willard, 1107 Merchants Exchange Building, San Francisco, California, on Friday, the 10th day of May, 1918, commencing at the hour of 5:15 o'clock in the afternoon of said day, at which time and place you are hereby [122] notified to be present and propound interrogatories if you shall think fit.

Dated: San Francisco, California, May 10, 1918.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant, San Francisco & Portland Steamship Company, a Corporation.

[Endorsed]: Receipt of a copy of the within notice of deposition hereby admitted this 10th day of May, 1918 at fifteen minutes to five P. M.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Libelant.

Filed Jan. 21, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [123]

[Title of Court and Cause.]

No. 16303.

Stipulation for Depositions in New York and Washington, D. C.

IT IS HEREBY STIPULATED by and between the respective parties hereto that depositions of such witnesses as either party may desire to call may be taken as follows:

(1) In New York, before any notary public, at the offices of Messrs. Kirlin, Woolsey & Hickox, 27 William Street, either (a) at such time or times as may be agreed upon between Nathan H. Frank, Esq., proctor for libelant, and Messrs. Kirlin, Woolsey & Hickox, acting for respondent and claimant; or (b) at the same place by two days' written notice of depositions on behalf of libelant served by the said Nathan H. Frank, Esq., upon the said Kirlin, Woolsey & Hickox at their said offices or on behalf of respondent and claimant by two days' written notice served by the said Kirlin, Woolsey & Hickox on Messrs. Haight, [124] Sanford & Smith, who are hereby authorized to receive said notice on behalf of said Nathan H. Frank, Esq., at their offices, 27 William Street, New York City; provided that said deposition shall not be noticed for a date later than the —— day of ——, 1918.

(2) In Washington, D. C., before any notary public, at the office of Walter S. Penfield, Esq., Colorado Building, either (a) at such time or times as may be agreed upon between Nathan H. Frank,

Esq., proctor for libelant, and the said Waslter S. Penfield, Esq., acting for respondent and claimant; or (b) at the same place by two days' written notice of depositions on behalf of libelant served by the said Nathan H. Frank, Esq., upon the said Walter S. Penfield, Esq., at his said office or on behalf of respondent and claimant by two days' written notice served by the said Walter S. Penfield on Nathan H. Frank, Esq., by leaving the same addressed to him at his, the said Nathan H. Frank's address in Washington, D. C., which the said Nathan H. Frank will notify to the said Walter S. Penfield upon his arrival in Washington, D. C.; provided that said depositions shall not be noticed for a date later than the 3d day of October, 1918.

It is further stipulated and agreed that the testimony given upon said depositions may be taken down in shorthand and reduced to typewriting by any stenographer appointed by the respective notaries public; that upon said depositions being written up they shall be duly certified by the notary public before whom they shall have been respectively taken and by him sent by registered mail addressed to the Clerk of the above-entitled Court; that the depositions may be put in evidence by either party on the trial of the cause; that all [125] objections as to the form of the questions are waived unless objected to at the time of taking the depositions and that all objections as to the materiality and competency of the questions are reserved to all parties; that the reading over of the testimony to

the witnesses and signing thereof are waived.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelant.
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Claimant. [126]

[Title of Court and Cause.]

No. 16303.

Agreement as to Time and Place of Taking Depositions.

Whereas, it is provided in a certain stipulation entered into by and between the proctors for the respective parties in the above-entitled cause that depositions of such witnesses as either party may desire to call may be taken in Washington, D. C., before any notary public, at the office of Walter S. Penfield, Esq., Colorado Building, at such time or times as may be agreed upon between Nathan H. Frank, Esq., proctor for libelant, and the said Walter S. Penfield, Esq., acting for respondent and claimant:

And, whereas, it is desired by said witnesses whose depositions are to be taken that the same should be taken at the War Trade Board, corner 20th & C Streets, N. W., Washington, D. C., instead of at the office of Walter S. Penfield, Esq.:

Now, therefore, it is agreed by and between Nathan H. Frank, Esq., proctor for libelant in said cause, and the said [127] Walter S. Penfield,

Esq., acting for and in behalf of the Respondent and the Claimant, as follows:

That the deposition of Lowell L. Richards will be taken to be used as evidence in the above-entitled cause on the 3d day of October, 1918, at the hour of 10 o'clock A. M. at the office of the Director of the Bureau of Transportation, War Trade Board Building, corner 20th & C Sts., N. W., Washington, D. C.

In witness whereof, said Nathan H. Frank, Esq., and said Walter S. Penfield, Esq., acting for and in behalf of the respective parties in the above-entitled cause, have set their hands this 3d day of October, 1918.

NATHAN H. FRANK,
Proctor for Libelant.
WALTER S. PENFIELD,
Acting for and in Behalf of Respondent and Claimant. [128]

[Title of Court and Cause.]

No. 16303.

Deposition of Lowell L. Richards, Witness, Taken in Behalf of the Respondent and Claimant.

Deposition of Lowell L. Richards, witness, taken before me, Charles Ray Dean, a Notary Public duly commissioned as such in and for the District of Columbia, United States of America, in an action pending in the Southern Division of the United States District Court for the Northern District of California, First Division, in Admiralty, wherein

the Aktieselskapet Bonheur, a corporation, is libelant, and the American Steamer "Beaver," her tackle, apparel, engines, boilers, furniture, etc., is respondent, and the San Francisco & Portland Steamship Company, a corporation, is claimant, the same being taken in behalf of said respondent and said claimant, on the 3d day of October, 1918, pursuant to a written stipulation for depositions hereto attached, and also pursuant to a written agreement attached hereto, signed by Nathan H. Frank, Esq., proctor for libelant, and by Walter S. Penfield, Esq., acting for the respondent and claimant, and providing [129] for the time and place of taking such deposition.

Said libelant was present by its proctor, Nathan H. Frank, Esq., said respondent and said claimant were each present by Walter S. Penfield, Esq., of Washington, D. C., acting for them and in their behalf.

LOWELL L. RICHARDS, of Washington, D. C., of lawful age, being first duly sworn by me, as hereinafter certified, deposes as follows:

Direct Examination by Mr. PENFIELD, for the Respondent and Claimant.

Q. State your name.

A. Lowell Lincoln Richards.

Q. Age? A. 47.

Q. Place of residence?

A. Washington at present, New York generally, Litchfield in summer.

Q. What official position, if any, do you hold

(Deposition of Lowell L. Richards.)

with relation to the War Trade Board of the United States?

A. Director of the Bureau of Transportation of the War Trade Board.

Q. Was the Bureau of Transportation organized and in operation on November 3, 1917?

A. Yes.

Q. Were you the Director at that time?

A. Yes.

Q. What are the duties of that Bureau?

A. Granting of licenses for all fuel and all ship's stores and supplies aboard vessels to admit of their leaving ports of the United States or possessions.

Q. Was or was not any control exercised by the Bureau of Transportation over the clearance of vessels leaving United States ports during the period from November 3, 1917 to January 14, 1918?

A. Yes, complete control was exercised over every vessel leaving the ports of the United States or possessions. [130]

Q. By what method was that control exercised?

A. By the granting of a license, as referred to above, for the bunker fuel and ship's stores and supplies.

Q. What if any matter did the Bureau take into consideration in granting licenses?

A. I don't feel at liberty to answer that question.

Q. State whether or not it took into consideration the nature of merchandise?

A. Not as a rule, excepting in special instances.

Q. What do you mean by special instances?

(Deposition of Lowell L. Richards.)

A. There may have been certain reasons, such as destination, flag or vessel, or other reasons, which would cause some Department or other of the Government to wish us to exercise control irrespective of export licenses that may have been granted. For example, at the present time the granting of licenses to sailing vessels sailing from Atlantic ports is strongly restricted and, nothwithstanding a merchant having secured export licenses for cargo to some specified destination, we may not be able to allow a sailing vessel to proceed with such cargo.

Q. Was that practice in vogue between November 3, 1917 and January 14, 1918?

A. I cannot answer so general a question; conditions of one kind and another have had to be thought of from time to time.

Q. State whether or not the issuance of licenses is conditioned upon the execution of certain agreements by the owners and by the masters of vessels?

A. At times.

Q. What is the nature of these agreements?

A. Varying,—one that has been particularly in vogue has been the requirement of the owners to guarantee that the vessel would [131] return direct to a port of the United States and with such cargo as approved by the War Trade Board.

Q. State whether or not you took into consideration the destination of the ship in granting licenses?

A. Always.

Q. What form of application was used between November 3, 1917 and January 14, 1918?

(Deposition of Lowell L. Richards.)

A. We had no regular form adopted at that time, but left the applicant the option of putting in his application in any way he saw fit, so long as he gave the name of the vessel, port from which clearance was desired, destination, cargo, and such other particulars as we required from time to time.

Q. State whether or not at that time you were using the forms which had been prepared by the old Exports Administrative Board, both for the applications and for the licenses?

A. As I stated, we left that at the option of the applicant, he could use an export application form, —he could have written a letter, he could have sent a telegram,—he could use any method at all whereby his desires were placed before us.

Q. As Director of the Bureau of Transportation, do you have access to and control of the correspondence and other files of this Bureau?

A. Yes.

Q. What Bureau?

A. Bureau of Transportation.

Q. Will you produce the part of your files relating to the Norwegian motor ship "Bayard" between November 3, 1917 and January 14, 1918?

A. I will.

Q. Mr. Richards, I direct your attention to a telegram from a Mr. McNear of San Francisco to J. Beaver White of the War Trade Board, dated November 24, 1917, and ask if you have such a telegram in your files. A. I have not.

(Deposition of Lowell L. Richards.)

Q. What official position does Mr. Beaver White hold in tne War Trade Board? [132]

A. Member of the War Trade Board.

Q. Is he representing any particular bureau of the United States Government on this War Trade Board?

A. Food administration.

Q. What official position, if any, does Mr. Frank C. Munson occupy with the War Trade Board?

A. Mr. Munson recently resigned from the War Trade Board, but prior to that he represented the United States Shipping Board as a member of the War Trade Board.

Q. When did Mr. Munson resign?

A. Within the last month.

Q. What is Mr. Munson's full name?

A. Frank C. Munson,—I do not know his middle name.

Q. Where is Mr. Munson now?

A. I do not know, but a week ago he was at Hot Springs, Virginia.

Q. Mr. Richards, I direct your attention to a telegram of November 24, 1917, from Mr. Munson of the War Trade Board to Mr. McNear of San Francisco, and ask if you have any record of such a telegram in your files?

A. I have a copy of such a telegram, but as the date of November 24, 1917, has been written in by hand in lead pencil, I can only assume that is the correct date.

Q. Is it the rule of the War Trade Board to

(Deposition of Lowell L. Richards.)

preserve copies in its files of all telegrams sent out?

A. Of the Bureau of Transportation, yes, I cannot answer for the other Bureaus of the Board, but I take it for granted.

Q. Is this telegram a part of the files of the Bureau of Transportation? A. Yes.

Mr. PENFIELD.—I now offer in evidence in behalf of respondent and claimant and read in evidence as part of the deposition of the witness the copy of the telegram of November 24th produced by the witness [133] which is in words and figures as follows, to wit:

Copy Telegram Exports Administrative Board.

November 24, 1917.

G. W. McNear,
433 California Street,
San Francisco, Cal.

Answering your telegram referred by Mr. White, see no objections to your fixing the motor ship BRAZIL lumber and general this coast to west coast South America and return cargo nitrate. Cannot approve voyage to New Zealand motor ship "BAYARD" as voyage does not seem necessary at present time. Suggest she goes west coast South America and back with nitrate. Motor ship "Kina" will be approved Philippines and return. If you secure approval Chartering Committee in New York, bunker license will be granted.

(Signed) FRANK C. MUNSON,
War Trade Board.

(Deposition of Lowell L. Richards.)

Q. State what is meant by Exports Administrative Board?

A. The War Trade Board succeeded the Exports Administrative Board and a copy of telegram referred to must have simply been written out on an old Exports Administrative blank.

Q. What is meant by the term "Chartering Committee" used in this telegram?

A. The Chartering Committee is the Committee of the United States Shipping Board sitting in New York, who approve or disapprove of charters and voyages of vessels.

Q. What was the practice of the War Trade Board at that time in regard to granting and refusing bunker license to ships before the charters of the ships for which applications for bunkers were made had been approved by the Chartering Committee?

A. If we knew the Chartering Committee had disapproved of a charter or voyage we would be very largely influenced by such disapproval and only grant bunker license if there was a particular reason developed subsequently why such license should be granted.

Q. State whether or not you would grant or refuse bunker licenses to such ships before the charters had been approved?

A. There were instances where licenses were granted through our [134] being unaware of any action having been taken by the Chartering Committee. It has all been a matter of development

(Deposition of Lowell L. Richards.)

and growth. Our aim from the first has been to co-operate with them and perfect our workings together so that no vessel could leave without first having the charter and voyage approved by the Chartering Committee, unless there were very strong reasons which we would have to take into consideration in some particular instances.

Q. How early did the practice start?

A. From the very formation of the Chartering Committee.

Q. State when that was?

A. I do not remember accurately, but my recollection is some time in September or October.

Q. State whether or not it existed the latter part of October? A. I believe it did.

Q. State whether or not it existed the first of November?

A. I feel very positive that it did, but I wish to have the matter confirmed in some way or other before I state it positively. (Witness telephones).

Q. Can you confirm it now?

A. The Secretary's office of the United States Shipping Board tells me over the telephone that it was September 29, 1917.

Q. Mr. Richards, what do your records show in regard to the granting of bunker licenses to the Norway-Pacific Line in San Francisco for its motor ship "Bayard" between November 3, 1917 and January 14, 1918 inclusive?

A. My records show that on January 14, 1918 a bunker license was granted for fuel oil and

(Deposition of Lowell L. Richards.)

ship's stores to Norway-Pacific motor ship "Bayard" from the United States to Australia and back to San Francisco.

Q. From what port in the United States?

The license was issued at San Francisco and was intended to apply from San Francisco only, although by the literal wording [135] it reads "United States to Sydney and Melbourne."

Q. Was any other bunker license granted to the "Bayard" between those dates?

A. I have no record of the same, and as we kept a careful record of all licenses granted, and have in this particular instance asked our San Francisco office for copies of all papers in connection with this vessel, it is safe to state that no license had been previously granted.

Q. Between those dates?

A. Between those dates.

Q. Was any application for license made by the "Bayard" between November 3, 1917 and January 14, 1918?

A. There unquestionably was not in writing, but there may have been some verbal inquiry made in San Francisco. The records do not disclose any application, even for the license which was granted, which leads me to infer that the application was made verbally for this license which was granted.

Q. Where was it made?

A. Unquestionably San Francisco.

Q. State whether or not your records show that

(Deposition of Lowell L. Richards.)

the application was filed on January 7th for the license which was granted on January 14th.

A. I have no copy of any application and cannot state positively without further communication with the San Francisco office. On August 13th I wrote to our San Francisco office that our files apparently were not complete and for them please, therefore, to send a copy of all the records and forms they had regarding this vessel, and these were sent to us by letter dated August 19, 1918, and do not include a copy of any application whatsoever. It may be, however, that the copy of application was overlooked. I might state that as a general practice applications have customarily been made for [136] bunker license at ports from which vessel wishes to clear, to our local agent, or in case there was no agent, to the Collector of Customs, and the said agent, or the Collector of Customs would then communicate by letter or telegram with us for instructions. In this particular instance there was evidently some misunderstanding on the part of the local agent as to his authority for granting license without reference to us, as our records do not disclose specific instructions sent by me on this particular boat. We authorized local agents and collectors to grant, without specific reference to us, licenses for certain classes of vessels, or license vessels bound on certain voyages. This is why our records in this particular instance do not show as complete information as they should have if there had not been such a misunderstand-

(Deposition of Lowell L. Richards.)

ing at that time on the part of our local agent, as the application for this vessel should have been referred to us before license was granted.

Q. Mr. Richards, referring to the telegram sent by Mr. Munson to Mr. McNear on November 24th, which has been introduced, state whether or not you know if the Mr. White referred to therein is John Beaver White of the War Trade Board?

A. Unquestionably.

Q. Do you know where,—on what files there is the telegram referred to that was sent by Mr. White?

A. I have not the faintest idea. I would have assumed it to have been among the files of Mr. Munson, but as his files are now in charge of this Bureau and we have made careful search through the same for any records regarding this vessel, I cannot give any definite idea what may have become of any records he may have had, but it is possible that anticipating inquiry for information respecting the vessel, the file may have been taken out by him shortly before leaving here, for [137] the purpose of being read over, and in some way mislaid. The only persons that I can think of who might give any light on the subject are Mr. Munson himself, or Mr. K. E. Knowles, who was his Secretary when he was a member of the Board here.

Q. Where is Mr. Knowles now?

A. I do not know positively, but think probably in the office of the Munson Steamship Co., 82 Beaver Street, New York.

(Deposition of Lowell L. Richards.)

Q. Is he any longer connected with the War Trade Board? A. He is not.

Q. When did he resign?

A. Approximately the same time as Mr. Munson.

Cross-examination by Mr. FRANK.

Q. Mr. Richards, I understood you to say, although it is not in this record, that this Bureau of Transportation was organized October 12, 1917?

A. Yes.

Q. At its inception, of course, and during the time of its early transaction of business, it had to feel its way in order to ascertain just exactly how to transact the business?

A. October 12th does not actually represent the time of the inception of the work of the Bureau of Transportation; it simply represents the date of a change in name, the functions of the Bureau of Transportation were operated in the same way for several months previously.

Q. I understood you to say that this matter of the Bureau's operations was a matter of development and growth?

A. It was from the time of the formation of the Exports Administrative Board created by the President following the passage of the Espionage Act approved June 15, 1917.

Q. How long after that was this Board organized?

A. Almost immediately. I should say within 24 hours, as all the steps were previously laid for immediate action. [138]

(Deposition of Lowell L. Richards.)

Q. By November 3d had you fully developed it or were you still improving on your experience?

A. We expect to improve on our experience until the war is ended but we were fully developed for all practical working at that time, excepting as to matters of form.

Q. As I understand you, of course the general policy and purpose of the Board was understood but the method of carrying out that policy was a matter of growth?

A. Well, the matter of policy has been a matter of growth but changes from day to day now just as it did at inception; the complete control of the sailing of all vessels was in actual practice long before that date.

Q. That is, so far as you could control them,—there were some vessels you had difficulty in getting hold of to control at first?

A. Not that I recollect. Instructions were sent to all collectors in the United States and possessions they were not at liberty to clear any vessel until bunker license had been granted by the Exports Administrative Board, and we then developed as rapidly as possible a system of allowing the local agent or collector to clear, without reference to us, as many classes of vessels or vessels bound on particular voyages, as we safely could.

Q. Would you mind stating, so far as it implies to the Pacific Coast, what voyages were included in those exceptions?

A. I should not like to state just what were in-

(Deposition of Lowell L. Richards.)

cluded in the exceptions, but I can state that they were instructed to refer certain classes of vessels to us, which class would have included this particular vessel.

Q. In that, are you referring to Norwegian motor ship? A. I am.

Q. That is, they were to be referred to you before bunker licenses [139] were granted?

A. Yes.

Q. That reference, of course, as I understand, could be done by telegraph and a prompt reply received in the same manner?

A. It has been the practice from the first of nearly all local agents or collectors to place applications before us by wire and excepting in occasional instances where the voyage was at so much later a date that a letter would do, this Bureau has practically an unbroken record for considerably over a year, and in fact since the formation of the Administrative Board, for having sent telegraphic instructions to the local port on the day application has been received, unless there were some special reasons why a reply had to be held up pending, for example, some special instructions from the War Trade Board. There has been no point that has been more worried over and appreciated by the Bureau of Transportation than the seriousness of delays to any vessels whatsoever.

Q. Now you have said something about working or trying to co-operate with the Chartering Board with reference to approval of the charters by the

(Deposition of Lowell L. Richards.)

Chartering Committee,—how about vessels that were put on the berth by the owner for owner's account, was there any necessity for delay in that connection?

A. The scope of the work of the Chartering Committee has been one of growth. Many charters and voyages were not at first supervised by them. We, from the very first, attempted to secure daily advices from them of all approvals and disapprovals, which information was placed at once on our files, so that when an application came to us, if we had any record of any action by the Chartering Committee, such information was seen by us.

Q. I am referring now, Mr. Richards, not to a charter but to a [140] vessel going out for owner's account?

A. As I stated, the scope of the Chartering Committee's work has been one of growth, and at first, as I recollect, they did not follow closely vessels which laid on the berth,—whether or not they were paying very close attention to vessels berthed last November, I do not recollect.

Q. I understood you to say, in answer to Mr. Penfield's question as to what matters the Bureau took into consideration in granting licenses, that you did not feel at liberty to answer,—I assume from that that each case was treated individually?

A. No, there were certain rules that were followed respecting certain classes of vessels and also respecting vessels bound on certain voyages, but in

(Deposition of Lowell L. Richards.)

many instances there was no definite method followed, but the vessel was treated on its particular merits. I simply do not feel that during the war I should attempt to outline all the varying reasons that may have swayed the War Trade Board in their decisions.

Q. Was there any general inhibition at that time against a vessel taking cargo from San Francisco to Manila and touching at two ports at Manila, with return cargo to San Francisco?

A. Around that time more careful supervision was being exercised over voyages with a view to having vessels only go on voyages which were considered particularly essential.

Q. We are concerned with the definite time,—after or before November 3d.

A. Assuming that November 24th was the date of the telegram from Mr. Munson to Mr. G. W. McNear, the message clearly shows by its wording that such efforts were being made at that time.

Q. November 24th? A. Yes.

Q. Previous to that time you have no knowledge on the subject? [141]

A. I should say that at least for two or three months before that time considerable consideration was given as to the particular need of voyages of any vessel.

Q. Wasn't the Manila trade considered important to be taken care of during all of that time?

A. You are now asking me to pass upon what voyages were considered desirable and what were

(Deposition of Lowell L. Richards.)

not,—this Bureau was acting under the instructions of the War Trade Board and I feel that answer to that question should with more propriety be made by the War Trade Board itself?

Q. Are you a director of the War Trade Board?

A. No, I am a director of the Bureau of Transportation, acting under the instructions of the War Trade Board.

Q. Then, as a matter of fact, you don't know whether at that time the voyage would or would not have been approved?

A. I do not recollect. I may have known. I may have been at the time perfectly prepared to have given the necessary instructions without reference to the Board, and again I may not have. The essential fact is that the application did not come before us, as it should have.

Q. The main purpose of the War Trade Board at that time was to secure the return of these vessels to an American port so that they should remain under the control of the War Trade Board.

A. I cannot by any means say that this was the main purpose; it was one of the objects that we were covering.

Q. There was no disposition unnecessarily to interfere with the trade?

A. That I cannot state positively, as there may have been at that time a very definite disposition to cancel a certain amount of tonnage to proceed to certain other trade, for example, nitrate trade,

(Deposition of Lowell L. Richards.)

which has been at all times one of the most essential trades connected with the war.

Q. But as a matter of fact, you did not when the vessel was [142] finally granted her license desire to put her in the nitrate trade?

A. No, but Mr. Munson's telegram supposedly of November 24th to Mr. McNear clearly intimates at that time the thought that nitrate was preferable.

Q. Is there anything else in that record referring to this vessel?

A. Nothing whatsoever prior to January 14th beyond what I have already stated, except a copy of letter from the Master of the "Bayard" dated January 12th guaranteeing the return of the vessel directly to the United States, and also copy of an affidavit of the same date that none of the stores permitted aboard would be transferred at sea to any other vessel, or landed at a foreign port; these papers also included a list of the actual stores.

Q. Previous to that time he, the local agent, was acting on his own initiative in some cases?

A. Yes, as outlined above.

Redirect Examination by Mr. PENFIELD.

Q. State whether or not the Bureau of Transportation is a branch of the War Trade Board?

A. It is.

Q. You stated that the application did not come before the Board as it should have, what application did you refer to?

A. A request that license be granted by the Bureau which would admit of the vessel sailing.

(Deposition of Lowell L. Richards.)

Q. Of what date?

A. Any date. We received no request for authority to grant such a license, as we should have.

Q. Do you refer to the application made for the trip that was refused on November 24th, or to the application that was granted in January?

A. I refer to any application for this vessel up to February [143] 1918. I am referring to the Bureau of Transportation. I cannot state what may have occurred in messages with members of the War Trade Board. [144]

CERTIFICATE.

I, Charles Ray Dean, the above-named Notary Public, do hereby certify that pursuant to the annexed stipulation for taking depositions entered into between the parties in the above-entitled cause, wherein the Aktieselskapet Bonheur, a corporation, is libelant, and the American Steamer "Beaver," her tackle, apparel, engines, boilers, furniture, etc., is respondent, and the San Francisco & Portland Steamship Company, a corporation, is claimant, and also pursuant to the annexed agreement as to time and place of taking the same, the above and foregoing deposition of the witness Lowell L. Richards was given orally before me at the office of the Director of the Bureau of Transportation, War Trade Board, corner 20th & C Steets, N. W., Washington, D. C., on the 3d day of October, 1918, between the hours of 10:00 A. M. and 12 noon; that the libelant was present by its proctor Nathan H. Frank, Esq.; that the respondent and the claim-

ant were each present by Walter S. Penfield, Esq., acting for and in their behalf; that said witness attended before me at said time and place and after being duly sworn by me to testify the truth, the whole truth, and nothing but the truth, testified as is above shown; that his testimony was taken down in shorthand in my presence and under my direction, and reduced to typewriting by O. C. Ham, a competent stenographer appointed by me for that purpose; that after being so reduced to typewriting said deposition was not read over to said witness, nor read by him, nor signed by said witness.

I further certify that I am neither of counsel, nor attorney, nor proctor, for either or any of the parties to said cause nor interested in any manner in said cause; and that [145] pursuant to said stipulation I am this day certifying said deposition, and after being duly sealed by me, I am sending the same by registered mail addressed to the Clerk of the above-entitled court.

Witness my hand and official seal at Washington, District of Columbia, this 4th day of October, 1918.

[Seal] CHARLES RAY DEAN,
Notary Public.

(U. S. Internal Revenue Stamp—25¢)

Taxable Costs.

Notary Fees.

Certificate and seal	.50
Administering oath	.15
Taking deposition	7.50

Expenses.

Revenue stamp	.25
First class postage	.18
Registered mail stamp	.10
Stenographic charges	12.75
Total	21.43

[Endorsed]: Filed Dec. 18, 1918. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [146]

[Title of Court and Cause.]

No. 16303.

Stipulation for Depositions in New York and Washington, D. C.

IT IS HEREBY STIPULATED by and between the respective parties hereto that depositions of such witnesses as either party may desire to call may be taken as follows:

(1) In New York, before any notary public, at the offices of Messrs. Kirlin, Woolsey & Hickox, 27 William Street, either (a) at such time or times as may be agreed upon between Nathan H. Frank, Esq., proctor for libelant, and Messrs. Kirlin, Woolsey & Hickox, acting for respondent and claimant; or (b) at the same place by two days' written notice of depositions on behalf of libelant served by the said Nathan H. Frank, Esq., upon the said Kirlin, Woolsey & Hickox at their said offices or on behalf of respondent and claimant by two days' written

notice served by the said Kirlin, Woolsey & Hickox on Messrs. Haight, Stanford & Smith, who are hereby authorized to receive said notice on behalf of said Nathan H. Frank, Esq., at their offices, 27 William Street, New York City; provided that said depositions shall not be noticed for a date later than the —— day of [147] ——, 1918.

(2) In Washington, D. C., before any notary public, at the office of Walter S. Penfield, Esq., Colorado Building, either (a) at such time or times as may be agreed upon between Nathan H. Frank, Esq., proctor for libelant, and the said Walter S. Penfield, Esq., acting for respondent and claimant; or (b) at the same place by two days' written notice of depositions on behalf of libelant served by the said Nathan H. Frank, Esq., upon the said Walter S. Penfield, Esq., at his said office, or on behalf of respondent and claimant by two days' written notice served by the said Walter S. Penfield on Nathan H. Frank, Esq., by leaving the same addressed to him at his, the said Nathan H. Frank's address in Washington, D. C., which the said Nathan H. Frank will notify to the said Walter S. Penfield upon his arrival in Washington, D. C.; provided that said depositions shall not be noticed for a date later than the —— day of ——, 1918.

It is further stipulated and agreed that the testimony given upon said depositions may be taken down in shorthand and reduced to typewriting by any stenographer appointed by the respective notaries public; that upon said depositions being written up they shall be duly certified by the notary

public before whom they shall have been respectively taken and by him sent by registered mail addressed to the Clerk of the above-entitled Court; that the depositions may be put in evidence by either party on the trial of the cause; that all objections as to the form of the questions are waived unless objected to at the time of taking the depositions and that all objections as to the materiality and competency of the questions are reserved to all parties; that the reading over of the testimony to the witnesses and signing [148] thereof are waived.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelant.

McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Claimant. [149]

[Title of Court and Cause.]

No. 16303.

(Deposition of J. B. Smull for Claimant.)

Deposition of J. B. Smull, taken on behalf of claimant at the office of Messrs. Kirlin, Woolsey & Hickox, 27 William Street, New York City, September 30, 1918, by agreement, before C. May Hudson, notary public, in pursuance of the attached stipulation.

Appearances:

J. PARKER KIRLIN, Esq., Representing Messrs. McCUTCHEON, OLNEY & WILLARD, Proctors for claimant;

(Deposition of J. B. Smull.)

NATHAN H. FRANK, Esq., Proctor for Libelant.

It is stipulated that all objections may be reserved for the trial.

It is agreed between counsel that reading over, signing and certification of this deposition is waived.

J. B. SMULL being duly sworn and examined as a witness for claimant testifies as follows:

(By Mr. KIRLIN.)

Q. Will you state your residence?

A. I reside at 11 E. 68th Street, New York City.

Q. What is your business training?

A. I started in the steamship business in the fall of 1894, as a ship and freight [150] broker, and I have been in that trade ever since. The first 15 years was as freight broker in business for myself, and since then as a partner in J. H. Winchester & Company, steamship brokers and agents at 358 Produce Exchange, New York City.

Q. You are a member of the Chartering Committee of the Shipping Board, are you?

A. I am.

Q. When was that Committee appointed?

A. You see I received my appointment on October 1, 1917, the appointment being made by the United States Shipping Board.

Q. Who were the other members of the Committee?

A. The other members of the Committee were Welding Ring and Daniel Bacon. Daniel Bacon was succeeded by Mr. A. C. Fetterolf, general

(Deposition of J. B. Smull.)

freight manager of the International Mercantile Marine; he has been serving on the Committee since about the end of November, I am not sure.

Q. Mr. Bacon resigned to join the navy, didn't he?

A. He was appointed a member of our Committee, being in the navy at that time as lieutenant commander, and the navy demanding his entire services he had to resign from the Chartering Committee.

Q. Mr. Fetterolf took his place?

A. Mr. Fetterolf succeeded him.

Q. Won't you state how the work of the Committee was divided up between the members?

A. We realized at the formation of the Committee that the work was going to be of considerable size. Mr. Welding Ring had been in the export commission business and chartering sailing vessels for about 50 years, consequently he took over most of the sailing vessel business, especially the trading on the Pacific Coast; Mr. Fetterolf being a line man was more familiar with line rates of freight and the situation here on the eastern coast, he has taken over the sailing vessels on this coast; I took over the business of the steamers and steamer chartering, as I had been brought up as a steamship broker, and had had 24 years' experience in this line. [151] I was the one best fitted on the Committee to handle the questions that would arise concerning the chartering of steamers in all trades all over the world.

(Deposition of J. B. Smull.)

Q. As a practical matter then were the steamship charters handled by you, the approval?

A. Yes, the approval of all charters for the steamers come before the Committee as a whole, and the approval of a charter is not granted unless two of the Committee of three agree that such charter should be granted, but the details of working out the conditions of chartering steamers is left with me, the sailing vessels left to Ring, the eastern sailing vessels to Fetterolf.

Q. While Commander Bacon was there what branch of the business did he look after?

A. Well, up to the time Bacon left we were endeavoring to handle the whole thing as a Committee, but the work was growing so large by the time Fetterolf got there we had it divided up.

Q. From whom did you receive your instructions as to your general duties?

A. We received our instructions directly from Mr. Hurley, Chairman of the United States Shipping Board.

Q. In writing or word of mouth?

A. Word of mouth first and then by letter.

Q. In a general way what were the instructions?

A. We were to have supervision of all charter parties carrying goods to and from this country in vessels under all flags, the charter parties were not to be approved until all the conditions of the charter-party met with the approval of the chartering committee. In addition to this we were to have the approvals of all voyages where no charter-party

(Deposition of J. B. Smull.)

existed. For instance a man would load his vessel and before that vessel could sail he would have to have the approval of the chartering committee for that voyage. This gave us direct control over all the shipments from this country to foreign countries. [152]

Q. In connection with the approval of charters was the approval of voyages a part of your function?

A. Yes. Subsequently the United States Shipping board decided that no vessel of neutral flag could be chartered to any one but the United States Shipping Board, we were the Agency through whom the United States Shipping Board chartered all their steamers, and to-day there are very few steamers of neutral flag under charter to any American individual, company or corporation.

Q. Were you working in connection with the War Trade Board from the beginning?

A. From the first day that we took charge we were working with the War Trade Board in the matter of their granting all the licenses for bunkers and stores on steamers and sailing vessels.

Q. What was the practice between your Board and the War Trade Board as to the issuance of bunker licenses?

A. From the start until today it has been the rule of the War Trade Board not to grant a bunker license to a sailing vessel or a steamer or motor ship to a foreign port unless their records show that the

(Deposition of J. B. Smull.)

charter party or the voyage has been approved by the chartering committee.

Q. In the end of October or early in November was there any existing practice of the chartering committee with regard to the approval or nonapproval of lump sum charters from the West Coast of this country to the Far East on neutral ships, including Norwegian?

A. We endeavored from the start to get all neutral boats on time charter to reputable American houses for round trips Pacific and round trips in the Atlantic; that is, where the boat was in this country and was to load to a foreign port and return from that foreign port to this country.

Q. In relation to that practice what was the practice of the Committee with regard to the request for approval of lump sum charters on neutral tonnage, auxiliary motor schooners or steamers from the West Coast to the Philippines or China, Japan [153] and Australia?

A. When you say lump sum charters, I presume you mean lump sum charters on gross form charter, where the charterer pays so much for the freight room and the owner pays all other expenses including the loading and discharging of cargoes?

A. Yes.

Mr. FRANK.—That is what is in your mind gross form charter.

A. We did not favor the gross form of charter.

(Deposition of J. B. Smull.)

Q. Perhaps you will explain your reasons why you were trying to get the boats on time charters instead of gross form or lump sum charters?

A. If steamers were approved for time charter it gave the Shipping Board direct control over what that boat should take in the way of rate and the cargoes she carried, and the commodities that she should carry. We were at that time very short of certain commodities that were needed for war purposes, and in regulating the time chartered rate to a lower basis than prevailing on the Pacific we could then go to the time charterer and say he would have to take certain commodities at a certain rate, allowing enough leeway between the charter and the freight both to and from the foreign country so the rates would be considerably lower than they were, so that gave us the power to regulate the port he should go to under the time charter; he would go to just the port we knew there was a cargo to take that in the interest of this country.

Q. It has been tesitfied to in this case that a firm of merchants in San Francisco made an offer to the agents of the ship in San Francisco of $400,000 for the round trip from San Francisco to two ports in the Philippines and return to San Francisco, and that this offer was under consideration at the time of the collision, out of which this controversy arises, which occurred on November 3; was the practice of the controlling committee at that time such that in any reasonable trade this offer would have been approved if accepted by the owner?

(Deposition of J. B. Smull.)

A. I don't think it would, but I want to qualify that by the statement that we have never said as a Committee what we [154] would do until the charter was put before us.

Q. But in accordance with the practice that had been in vogue up to that time would this in normal course of procedure have been likely to have met with the approval of the committee?

A. No, our records show no approval to any Norwegian boat at that time.

Q. It has been testified that approval was secured for at least two steamers, I believe of Danish registry, perhaps a third, the "Kina," "Peru" and the "Arabian," for return voyages from points in the Far East to San Francisco, what do you say as to that do you recall those cases?

A. Yes, I do because of the fact that they are all owned by the East Asiatic Company. This company refused to charter those boats from the East to the United States on a time charter basis. In order to get the boats to a United States Pacific port we had to agree to allow the boats to come to the eastward on a gross form charter, we realizing that when the vessels once got to an American port we could control their movements through the War Trade bunker licenses. It did not seem to be possible to get the East Asiatic steamers on the Pacific Coast on any other basis. They refused time charter and we had to get them to a Pacific Coast port to control them; they were out trading in the East

(Deposition of J. B. Smull.)

and we had no method by which we could detain them.

Q. Was the reason of the policy the desire to get control of neutral tonnage so that it could be required to return to United States ports?

A. In order to get them on time chartered basis, and having the control of the boat in a United States port we could force them to take the time charter terms.

Q. Force them to return here?

A. And when the time charter is made it is made for a round trip, out and home again.

Q. So that the continuation of the neutral tonnage in our trade was part of that policy?

A. Yes. [155]

Q. Did you as a matter of fact have an application to approve a lump sum charter on the "Bayard" from the American Asiatic Company of San Francisco? A. Not that I remember.

Q. Did you have an application to approve a lump sum charter on the "Bayard" by the firm of George W. McNear, Inc.?

A. Lump sum on a time charter basis?

Q. Lump sum first?

A. Gross form—yes, I believe there was.

Q. Give us the date of that, will you please?

A. What do you want, the date of the wire?

Q. Yes? A. December 5.

Q. Will you read the telegram into the record?

Claimant's Exhibit "A."

"1917 Dec. 5 Am 12 17.

San Francisco Calif. 4

Chartering Committee United States Shipping Board

New York City NY

Your telegram first instant relative chartering Arabien have offered hundred seventy thousand dollars lump sum this steamer one way Seattle to Japan ports January sailing also have bid two hundred seventy thousand dollars motorship Bayard one Pacific round San Francisco to Japan and return San Francisco or Atlantic Coast must have two steamers to clear our congestion freight this port and we were advised that owners these steamers will not charter on Government form time basis but will place same on berth themselves for other ports if you can't approve our bids can you not help us arrive at some agreement with the owners in order that we will not lose the steamers and further congest this port.

AMERICAN ASIATIC CO., INC."

Mr. FRANK.—Of course you understood that that is not binding on us, it has no relation to us, it is immaterial in this controversy what somebody else did.

Mr. KIRLIN.—I suggest it is material as showing the practice of the Chartering Committee with regard to nonapproval [156] of lump sum charters at that time.

(Deposition of J. B. Smull.)

The telegram is offered in evidence.

It is marked Claimant's Exhibit "A."

There is no objection on the ground that it is a copy.

Q. What reply was made to that?

Witness produces reply which is offered in evidence.

It is marked Claimant's Exhibit "B" and reads as follows:

Claimant's Exhibit "B."

"December 5, 1917.

Collect Day Letter

American Asiatic Company,

San Francisco, Cal.

Replying your telegram Arabien committee cannot approve proposed sum hundred seventy thousand dollars but will approve hundred thirty thousand dollars Seattle to Japan ports one Japanese steamer fixed yesterday this basis telegram total deadweight carrying capacity motorship Bayard.

WR/O CHARTERING COMMITTEE.

Mr. FRANK.—I make the same objection to all the following telegrams.

Q. Did you receive a reply giving the deadweight capacity of the motorship? A. We did.

Q. That is this telegram (handing witness paper)? A. Yes.

The telegram produced is offered in evidence.

(Deposition of J. B. Smull.)

It is marked Claimant's Exhibit "C" and reads as follows:

Claimant's Exhibit "C."

"San Francisco, Cal. Dec. 5-17.

Chartering Committee US Shipping Board

New York.

Your date motorship Bayard total deadweight fifty three hundred cargo bale capacity three hundred three thousand four nineteen cubic feet.

416A AMERICAN ASIATIC CO. [157]

Q. Was there any reply to McNear?

A. Yes, as per copy herewith.

Witness produces telegram which is offered in evidence.

It is marked Claimant's Exhibit "D" and reads as follows:

Claimant's Exhibit "D."

"December, 6, 1917.

Collect

American Asiatic Company,

San Francisco, Cal.

Sorry cannot authorize fixing motor schooner Bayard at present.

JBS/O CHARTERING COMMITTEE"

Mr. FRANK.—None of these are McNear telegrams.

The WITNESS.—No, they started work on the date first produced.

Q. What is the next communication?

(Deposition of J. B. Smull.)

A. Then McNear started in.

Witness produces telegram.

Q. You received the telegram from Mr. McNear dated December 7 relating to both the Brazil and Bayard? A. Yes.

Q. And that is this telegram? A. Yes.

The telegram is offered in evidence.

It is marked Claimant's Exhibit "E" and reads as follows:

Claimant's Exhibit "E."

"1917 Dec. 7, AM 2:58.

San Francisco, Calif. Dec. 6.

US Shipping Board Chartering Committee,
New York City.

Referring to your message date we are offering for Norwegian motor vessels Brazil and Bayard forty-five shillings per ton on time charter delivery and redelivery this coast for one round transpacific either New Zealand and Australia or Orient stop the Bayard is fifty-two hundred tons deadweight and Brazil forty-four hundred tons deadweight both vessels are now here and ready for cargo which is accumulated by railways and other shippers who are anxiously [158] desiring to ship so as to relieve the great freight congestion at this port stop kindly wire us our immediate approval or if not approved what you will approve.

G. W. McNEAR, *Inc.*"

(Deposition of J. B. Smull.)

Q. What is this lead pencil memorandum?

(By Mr. FRANK)

A. I don't know (looking at telegram), "Subject Board Washington have priority over other homeward business," I couldn't tell you what it is.

(By Mr. KIRLIN:)

Q. What is the next thing?

A. That is the reply.

Witness produces telegram dated December 7 which is offered in evidence.

It is marked Claimant's Exhibit "F" and reads as follows:

Claimant's Exhibit "F."

"December 7, 1917.

Collect

G. W. McNear, Inc.,

San Francisco, Cal.

Would approve Brazil Bayard as per your telegram but Shipping Board Washington must have priority on homeward business.

JBS/O CHARTERING COMMITTEE."

Q. Let us have the next communication?

Witness produces telegram of December 15 signed G. Loken.

Q. Who is he?

A. I evidently put a memorandum there, Manager for G. W. McNear, I put the memorandum on there at the time I presume, I have known Mr.

(Deposition of J. B. Smull.)

Loken for a good while and I wanted the boys outside to know who he was.

The telegram is offered in evidence.

It is marked Claimant's Exhibit "G" and reads as follows:

Claimant's Exhibit "G."

"1917 Dec. 15, AM. 4:43.

San Francisco, Calif. 14.

US Shipping Board Chartering Committee,
Customs House, New York, NY.

Referring to your message of sixth and seventh instance [159] and our message sixth instance in particular to vessel Bayard Textile Alliance have twelve thousand bales wool to ship from New Zealand to San Francisco which is urgent for war purposes and we have made tentative arrangements with Textile Alliance local office here who have telegraphed their New York headquarters to get your approval of taking this wool and furthermore Textile Alliance have cabled London to have Interallied Chartering Committee London approval likewise stop Kindly telegraph us immediately your approval on this instead of vessel returning via New Caledonia.

G. LOKEN,
Manager for G. W. McNear."

Q. Any reply to that? A. Yes.

Witness produces reply which is offered in evidence.

(Deposition of J. B. Smull.)

It is marked Claimant's Exhibit "H" and reads as follows:

Claimant's Exhibit "H."

"December 15, 1917.

Collect Day Letter

G. W. McNear,

San Francisco, Cal.

Referring your message fifteenth vessel Bayard Committee will approve proposed business cargo wool from New Zealand to San Francisco advise full particulars in regard to same.

WR/O WELDING RING,

Chairman Chartering Committee."

Q. You received a further communication dated the 15th from McNear? A. Yes.

The telegram referred to is offered in evidence.

It is marked Claimant's Exhibit "I" and reads as follows:

Claimant's Exhibit "I."

"San Francisco, Calif., 235 PM Dec. 15, 1917.

[160]

Welding Ring,

Chairman Chartering Committee,

U S Custom House, New York, N. Y.

Your message fifteenth inst. regarding vessel Bayard we have accepted wool business tentatively from the Textile Alliance New York with whom please communicate and have Textile Alliance or yourselves arrange with Interallied Chartering

(Deposition of J. B. Smull.)

Committee London by cable for approval of business.

G. W. McNEAR, INC.,
G. LOKEN, Mgr.
5 43 PM

Q. Did you reply to that? A. Yes.

Witness produces telegraph dated December 18.

Q. This is another telegram from McNear, is there any reply as far as your files show to the preceding?

A. No, I don't think that called for a reply, he said what he was doing.

Q. The next is a telegram from McNear dated December 18? A. Yes.

The telegram referred to is offered in evidence.

It is marked Claimant's Exhibit "J" and reads as follows:

Claimant's Exhibit "J."

San Francisco, Calif., Dec. 18, 1918.

Chartering Committee,
U S Shipping Board,
Custom House, New York.

London agents of Fred Olsen and Co. cable agents here in reference to motor ships Brazil and Bayard quote subject obtaining approval of Shipping Board and homeward cargoes these vessels we have fixed full cargoes bagged wheat and or flour from Australian port Galveston St. John New Brunswick range unquote we fully appreciate their desire to control the return cargoes by these vessels at the

(Deposition of J. B. Smull.)

same time I feel that the Shipping Board should exercise this control [161] designating cargo that seems most urgent for our own Government requirements. Textile Alliance have advised us that there are quantities of wool in New Zealand which is urgently required here for war purposes and in my wire to Mr. Carry I suggested that he should insist that the Bayard make voyage from here to New Zealand and Australia bringing back this wool for Textile Alliance and as a compromise I proposed that they have the Brazil take back a cargo of wheat and flour from an Australian port but I think the Food Administration would prefer to have this wheat delivered to an American Atlantic port. Up to present time have no reply from Mr. Carry. The vessels are idle here and I am anxious to see them moving. If there is anything you can do to help the situation out will appreciate it very much please wire as soon as possible.

G. W. McNEAR."

(Pencil notation.)

"We have asked for British approval of these steamers to make Pacific round rider Pacific have been waiting their reply for last few days."

Q. What was the next communication?

Witness produces telegram dated December 21, 1917 from McNear, which is offered in evidence.

(Deposition of J. B. Smull.)

It is marked Claimant's Exhibit "K" and reads as follows:

Claimant's Exhibit "K."

"San Fran., Dec. 21, '17.

Chartering Committee,

U. S. Shipping Board, Custom House, N. Y.

Regarding motorships Bayard Brazil unless you bring strong pressure to bear on Interallied fear they won't let go in any event there will be further delay in view of all the circumstances please authorize us [162] to send following cable to owners quote Bayard Shipping Board have approved berthing vessel New Zealand and Australia but maintaining privilege indicating priority return cargo destination American Pacific or Atlantic port undertaking to arrange accordingly with Interallied Committee unquote please wire at once if we may send this cable and proceed booking cargo outwards which you will understand takes time to get forward.

326P G. W. McNEAR."

Mr. FRANK.—This is only relating to the business, not the vessel.

Mr. KIRLIN.—It all shows how the Committee was acting at this time.

Q. Your reply to that was December 21?

A. Yes.

The telegram is offered in evidence.

(Deposition of J. B. Smull.)

It is marked Claimant's Exhibit "L" and reads as follows:

Claimant's Exhibit "L."

"December 21, 1917.

Collect Day letter

"G. W. McNear, Inc.,

San Francisco, Cal.

Bayard Brazil Washington authorizes us to wire you to go ahead on these vessels as per your telegram but Carry asked us to remind you that his understanding on the outward business cargo to be booked subject his confirmation in other words cargo space will be divided among the several interests at your loading port and not given to any one party if you get confirmation from owners we will endeavor to get Interallied to agree to the voyages of both vessels stop on homeward voyages we must have priority as [163] per your telegram would not advise booking cargo until you get confirmation from owners and Interallied sanction.

JBS/O CHARTERING COMMITTEE."

Q. Did you telegraph him further on the same date? A. We did.

Witness produces telegram which is offered in evidence.

(Deposition of J. B. Smull.)

It is marked Claimant's Exhibit "M," and reads as follows:

Claimant's Exhibit "M."

"December 21, 1917.

Collect Day letter

G. W. McNear, Inc.,

San Francisco, Cal.

Bayard Brazil still waiting hear from Interallied Committee London for their approval return Pacific Coast as we would prefer this trade both steamers.

JBS/O CHARTERING COMMITTEE."

Q. You received a reply from McNear on the 22d? A. Yes.

The telegram is produced and offered in evidence.

It is marked Claimant's Exhibit "N" and reads as follows:

Claimant's Exhibit "N."

"San Francisco, Dec. 22, 1917.

Chartering Committee,

U. S. Shipping Board, Custom-house,

New York, N. Y.

Bayard Brazil referring your wire twenty-first stop first please assure Carry that all regular shippers to New Zealand and Australia will be given equal opportunity and equal rates on outward cargo have cabled owners quote Bayard Brazil Shipping Board approves New Zealand Australia but retaining right to indicate priority return cargoes

(Deposition of J. B. Smull.)

and destination undertaking endeavor secure Interallied sanction accordingly [164] unquote we already have owners authority for these voyages and Interallied sanction providing owners accept wheat and flour to East Coast stop if Shipping Board wants wool or some other cargo we ask that you communicate Interallied and get their sanction stop must you cable London or can it be arranged New York we are losing valuable time and will much appreciate your further efforts to bring matters to a conclusion please telegraph what you do.

4:15 P. M. G. W. McNEAR."

Q. Did you receive this further message dated the 24th from McNear? A. I did.

The telegram is offered in evidence.

It is marked Claimant's Exhibit "O" and reads as follows:

Claimant's Exhibit "O."

"San Francisco, Calif., Dec. 24–17.

Chartering Committee,

U. S. Shipping Board, Custom-house,

New York, N. Y.

Fred Dessen London agent of owners Bayard and Brazil cable today quote Bayard Brazil charters signed awaiting your approval unquote this refers to charters Dessen had arranged with English wheat executive for full return cargoes wheat and flour from Australia to East Coast Galveston St. John, Brunswick range stop Carry telegraphs today quote have asked Chartering Committee to en-

(Deposition of J. B. Smull.)

deavor to arrange charters Brazil and Bayard per your request but with the understanding you and I agreed to here that Shipping Board shall designate cargo in and out and that space will be divded among various shippers no one concern given advantage unquote it is regrettable that there is apparently so little co-operation between Interallied Committee and Shipping Board and most [165] unfortunate that these vessels are not working aside from question of loss owners are suffering stop hope you can and will expedite matters.

G. W. McNEAR."

Q. Did you reply according to this message of the 24th? A. Yes.

The telegram is offered in evidence.

It is marked Claimant's Exhibit "P" and reads as follows:

Claimant's Exhibit "P."

"December 24, 1917.

Collect Day letter

G. W. McNear,

San Francisco, Cal.

Bayard Brazil British approval comes from London so far no word received doing everything possible to hurry.

CHARTERING COMMITTEE."

Q. Is that the end of the communications?

A. It is the same sort of telegram, all the getting of the Interallied executives' approval in London.

(Deposition of J. B. Smull.)

Q. Explain that, I see there is reference to this Interallied, what does that mean?

A. In accordance with the agreement between England and Denmark as well as other neutral countries they cannot charter their vessels without the approval of the Interallied in London. Danish-American boats after approval by our chartering committee, the owners also have to get the approval of the Interallied Chartering Committee in London before the owner can perform the voyage.

Q. Does that apply to Norway as well?

A. Yes, that regulation was enforced for many months before we went into the war; it was their control over vessels.

Mr. FRANK.—Objected to as hearsay.

Q. You had experience in that in your actual operations?

A. Every day, every Norwegian boat and every Danish boat had to [166] get the approval of the Interallied executives as well as ours.

Mr. FRANK.—Same objection.

Q. Is there anything more? A. That is all.

Q. The rest of it is about the Allied approval?

A. Yes. I first want to say I have a few other telegrams along this same line of getting Interallied approval which was finally granted, just the same sort of telegrams.

Q. Were you during part of this same interval covered by these telegrams that have been put in evidence in communication with prospective charterers of the motor vessel "Brazil"?

(Deposition of J. B. Smull.)

A. Yes, the negotiations on both boats were pretty much along the same line, as you will note from the telegrams I have submitted; they were hooked up together, practically, by McNear, McNear was trading on both boats at the same time.

Q. Will you produce what communications you had regarding the "Brazil"?

Mr. FRANK.—This is all subject to the same objection.

A. I have a little more on the "Brazil," that might have some bearing on it, one man's interest or the other.

Q. Let us have what you have. When did that begin?

A. This began on November 27, a telegram sent by W. R. Grace & Company on November 27 to the Chartering Committee at New York.

Witness produces telegram which is offered in evidence.

It is marked Claimant's Exhibit "Q" and reads as follows:

Claimant's Exhibit "Q."

"San Francisco, Calif. 26.
1917 Nov. 27 AM 2:40.

Chartering Committee,
U. S. Shipping Board, Custom-house,
New York, N. Y.

Have cable advising foundering our chartered Norwegian steamer Thor enroute to Orient and essential we should replace this vessel to take care

(Deposition of J. B. Smull.)

of homeward cargo urgently needed here stop Norwegian motorship [167] Brazil now ready here is offering for six months charter at sixty shillings Government form we understand your Board will not approve charters trans-Pacific at once forty-five shillings kindly advise us on this point and also advise us if it will be in order for us to charter Brazil for six months at forty-five shillings.

W. R. GRACE & CO."

Q. Was there any reply to that?

A. No, I haven't the reply, it is headed for the Transvaal, then we got McNear.

Q. Nothing came of the Grace negotiation?

A. No.

Q. Then did McNear come into it, if so when?

A. First I got from McNear, those wires all work out together.

Witness produced telegram dated December 15 which is offered in evidence.

It is marked Claimant's Exhibit "R" and reads as follows:

Claimant's Exhibit "R."

"San Francisco, Calif., 10 57A 15
Dec. 15, 1917, PM 5:45.

US Shipping Board Chartering Committee,
Customs-house, New York, N. Y.

Referring your messages sixth and seventh inst. and our message sixth inst. in particular to vessel Brazil we have communication from London stating that British authorities disapprove charter as ar-

(Deposition of J. B. Smull.)

ranged and approved by you furthermore advices state that London was communicating with Shipping Board regarding this therefore kindly have this charter for Brazil from this coast to Orient and return here taken up by Shipping Board with Interallied Chartering Committee London by cable and get London approval meantime vessel has been lying for sometime notwithstanding freight movements in this port are greatly congested owing to lack of tonnage.

G. W. McNEAR, Inc.,
G. LOKEN, Mgr.'' [168]

A. (Continued.) This file is just a repetition, they are all hitched up, it is the same wires.

Q. On a different boat?

A. It shows it in the other wires.

Q. The ''Brazil'' is refered to there?

A. Yes, these are only copies of the original wires you have already got.

Q. I don't care for any duplicates, but any new wires let us have?

A. It shows all through those telegrams he was working on the two boats in conjunction, hooked them both up together. There is another wire from Grace showing how bad off he is for tonnage, what he has done.

Witness produces telegram dated December 6.

Q. This pertains to the other one? A. Yes.

The telegram is offered in evidence.

(Deposition of J. B. Smull.)

It is marked Claimant's Exhibit "S" and reads as follows:

Claimant's Exhibit "S."

"San Francisco, Dec. 6, 1917.

Chartering Committee,

US Shipping Board, New York.

Since our charter of transvaal which you authorized Nov. 28th we have been looking for other tonnage to submit for your approval but the only suitable vessel we have found is Norwegian motorship Brazil and on offering this vessel forty-five shillings accordance your telegram November 27th owners replied they preferred waiting before chartering at this rate stop our steamer Cacique now enroute San Francisco with coal cargo for Navy Department should be ready here December 20th and if this steamer could be spared for sixty days before proceeding to Chile for nitrate cargo it would be an exceptional opportunity to send Cacique on trans-Pacific voyage as this vessel is particularly adapted for that trade account large size great steaming radius and facility to carry her own fuel [169] for the round voyage account burning oil please advise us.

W. R. GRACE & COMPANY.

428 A. M."

Witness produces telegram dated December 27 which is offered in evidence.

It is marked Claimant's Exhibit "T" and reads as follows:

Claimant's Exhibit "T."

"San Francisco, Dec. 27, '17.

Chartering Committee,

U. S. Shipping Board, Custom-house,

New York.

Bayard Brazil replying your wire twenty-first sorry if there has been any misunderstanding stop agents of owners cabled firm offer our account forty-five shillings tims charter terms delivery here redelivery here in meantime agents here received cable from London agents of owners advising acceptance full cargoes wheat and flour for these vessels from Australia to East Atlantic Coast subject approvals Shipping Board and further instructing them to berth vessels for New Zealand and Australia stop we tried to make this position clear to you in our telegram twenty-first which please re-read in conjunction with your reply same date stop considering that you disapprove berthing vessels we should advise agents to cable owners renewing our offer time charter terms telling them Shipping Board disapprove berthing owners account please confirm at once stop regarding wool account Textile Alliance we felt we already had your approval see your letter December fifteenth but in view of Interallied insistence that vessels being up wheat and flour we suggested that you

get their sanction for [170] the wool which we understand urgently needed for war purposes.
345P. G. W. McNEAR."

Witness produces agreement with the Interallied which is offered in evidence, telegram from McNear dated January 4.

It is offered in evidence.

It is marked Claimant's Exhibit "U" and reads as follows:

Claimant's Exhibit "U."

"San Francisco, Jan. 4.

Welding Ring, U. S. Shipping Board,
Custom-house, New York.

Norway Pacific Line Company have cable from London agents of owners quote Interallied agreed Bayard Brazil proceed New Zealand Australia return wool Pacific Coast understand Interallied cabled States authorities that both wheat charters cancelled unquote we are glad that your efforts have been successful we have chartered vessels from owners on time charter terms as authorized by you and are now booking cargo outward stop please have Mr. Carry say if he has any preference as ro designating outward cargo stop we are concluding arrangements with Textile Alliance for twelve thousand bales wool and such further quantities as they may be able to supply back to San Francisco confirm.

G. W. McNEAR, Inc."

(Deposition of J. B. Smull.)

Q. Any reply to that?

Witness produces telegram dated January 7 which is offered in evidence.

It is marked Claimant's Exhibit "V" and reads as follows:

Claimant's Exhibit "V."

"January 7, 1918.

Chg. U. S. Shipping Board,
Chartering Committee,
G. W. McNear, Inc.
San Francisco, Cal.

Bayard Brazil Carry says for us to wire you to take [171] your approvals from Cook Shipping Board yours

JBS/O CHARTERING COMMITTEE."

Q. The "Brazil" was eventually closed on a time charter basis also, was she? A. Both, yes.

Q. Did you say you had examined your records before you came to see whether you had approved any lump sum charters the end of October or early November?

A. Yes, I went through our list of approvals up to about the first of the year, and from the time I went in there are no approvals of steamers under foreign flag round trip charters.

Q. Lump sum?

A. Lump sum gross form. The only approval was several of these boats in the East we had to get this way and we allowed a lump gross charter to get them here.

(Deposition of J. B. Smull.)

Q. After you got the "Kina," "Peru" and "Arabian" here did you approve any lump sum charters on them?

A. No, they are all charted to the United States Shipping Board now.

Q. All on time charters? A. Yes.

Q. These telegrams speak of approvals at 45 shillings per deadweight ton per month, time charter, was that your complement at that time?

A. Yes, sir, maximum rate. After we established the rate of 45 shillings there were no boats fixed over that rate; today the rate is 35 shillings, a gradual reduction from 60 shillings.

Cross-examination by Mr. FRANK.

Q. I understand you were inducted into office here about October 1? A. Yes, sir.

Q. These other gentlemen did not take their positions at the same time you did?

A. No, Mr. Ring on September 15.

Q. The same year? A. Yes.

Q. And the other gentleman subsequent to you?

A. Yes.

Q. How long subsequent?

A. Bacon, about 2 days.

Q. Of course, when you first came together it was necessary for [172] you to organize and to work out some theory, wasn't it? A. Yes.

Q. It took you some time to do that before you settled down? A. No, sir.

Q. It did not? A. No, sir.

(Deposition of J. B. Smull.)

Q. Had you worked out all your plans before November?

A. The plans that we laid out were the scrutinizing of all charter-parties, the rates and conditions of charter, and then followed in a few days the establishment of maximum rates. That was the first thing we did, that we took up immediately and established maximum rates on time charters, and maximum rates on coal, and maximum rates on nitrates, etc.

Q. I understand, but you had to feel your way to a certain extent to find out what the business was, where it was going, who was carrying, where the ships were, and things of that sort, didn't you?

A. Oh, yes.

Q. It took you some time to get that into shape?

A. Not as long as you would think, for the reason that that was my business before I went into it; that is the nature of my business as a ship broker.

Q. But the business had changed by reason of the war, hadn't it?

A. Yes, it had changed, but the basic principles were the same until the Board said that no boat could be chartered to an individual, which was along in March.

Q. That is March of this year?

A. 1918, yes.

Q. And your proceedings then were progressive during that time, up to that point?

(Deposition of J. B. Smull.)

A. Yes, sir.

Q. When any individual charter was presented to the Board, say up to November 3 or along into November, was the individual charter scrutinized and individual judgment given upon it?

A. Yes, sir.

Q. There was no fixed rule applying to all charters that came in, was there? A. Yes, sir. [173]

Q. In what respect? The charters as they came in were all placed before the secretary of the Board, who tried to ease our labors as much as possible by pointing out by rigid pencil marks the ports, loading ports, destinations, rates, charterer's names, and such as that, then the charters came from his desk into the room of the Committee, and each charter from the inception of the Committee until to-day has been read and looked over by each member of the Committee. When we go in session we sit around the table and examine each charter-party, and then the charter parties are put in a pile before the chairman, and then they are taken one by one and acted upon. In cases where we have not the charter-party, the full conditions of charter expressed in telegrams are acted upon, or in cases where there are letters presented, the charter party made in error, we act on the letter.

Q. What was the necessity of all that detail, Mr. Smull, if there was a fixed rule applying to all charters?

(Deposition of J. B. Smull.)

A. You can't make a fixed rule on all charters. Every charter that comes in differs a little bit.

Q. That is what I apprehended; and then as a matter of fact you have to pass an individual judgment on each charter? A. Yes, sir.

Q. Dependent upon various details with respect to the charter, whether it would or would not be approved by the Committee? A. Yes, sir.

Q. And until you had the particular charter before you you could not say whether you would or would not approve it?

A. With the qualification that if a wire was sent with the full details?

Q. Unless you had the wire with full details you could not say whether you would or would not?

A. No, sir.

Q. When was it that the Board finally decided that no neutral could be chartered except to the Board?

A. I believe about March 18, 1918.

Q. Before that time the neutrals could charter to merchants [174] without interference on the part of the Board?

A. Yes, subject to the charter-party conditions, made with our approval.

Q. When was it that you began to interfere with the placing of vessels on the berth for the account of the owner? A. Almost immediately.

Q. I understand, Mr. Smull, that in October and November no vessels were permitted to be placed on the berth for account of the owner?

(Deposition of J. B. Smull.)

A. I would not say that absolutely, I would not say that offhand; it is a big question; that was the idea.

Q. You have not looked into it, you have no recollection about it, is that the situation?

A. I have a recollection of Norwegian boats on the Pacific, we did not want the owners to berth or charter on gross form of charter, for almost immediately we reduced the time charter rates, we were trying to get the owners to come into time charter conditions to reputable firms.

Q. You were feeling your way, you didn't feel you had control of the situation.

A. No, we had control right away of boats that were in this country, we didn't have it when they were up in Canada, up in Vancouver, which was rather a sore point.

Q. You would not undertake now to say that such vessels were not placed in berth during the period here in question?

A. To the best of my recollection there were no boats on berth on account of owners.

Q. Your recollection, I believe you have no record in mind or no memory about it?

A. I do not recollect any boat that was on the berth after the 1st of November, Norwegian boat after the 1st of November.

Q. What periods are you speaking of—I mean around the 3d of November?

A. I would not say the exact date, I would say about the 1st.

(Deposition of J. B. Smull.)

Q. You mean the first part of November, not the first day? A. Yes.

Q. It might include the 3d of November?

A. Yes. [175]

Q. Probably a week or two after?

A. I don't know, about the first of November is about all I can say; it might have been in October because we tried to do that right away.

Q. There is some testimony here of ship brokers out there—and I refer to Page Brothers, you know them?

A. They are not ship brokers, they are freight brokers.

Q. They were not interfered with until the 27th of November, you would not undertake to say that they were not right?

A. We never had a communication from Page Brothers, for approvals.

Q. Their testimony with reference to ships they got freight for—what I am trying to get at is, you would not undertake to say their testimony so far as that was concerned was not correct, you personally have no recollection that would gainsay it? A. No.

Q. With respect to your working in connection with the War Trade Board, that was only a sort of general understanding that you have testified to between you and the War Trade Board?

A. It was an agreement.

Q. As each vessel came up there was no special communication? A. Yes.

(Deposition of J. B. Smull.)

Q. Do you remember whether there was any communication between you and them in reference to the "Bayard?"

A. Not until she was approved.

Q. Mr. Corey, who was the representative of the War Trade Board in San Francisco at that time, testified as follows:

"The charter committee has nothing to do with the War Trade Board.

"Q. You spoke of them. A. They are advisory.

"Q. When were they organized?

A. I don't know.

"Q. Then it is your opinion that the charter committee is advisory to the War Trade Board?

A. Only as regards the destination, the routing of the vessel.

"The COURT.—Q. The scheme that you speak of was in effect as early as October 1?

A. Yes; it was more or less disorganized [176] up until the 15th of January, when we had regular printed forms, and we began to use our judgment as well as possible before that."

A. I do not concur. I will explain, the Chartering Committee has nothing to do with the local agent of the War Trade Board, our dealings are entirely with the headquarters of the War Trade Board.

Q. As far as his actions are concerned, so far as he has testified as to the manner in which he handled the business there you have no suggestion

(Deposition of J. B. Smull.)

to offer, you would not attempt to gainsay what he said was true?

A. Except I know those men have no authority without consulting the head office. The New York office I have worked with pretty closely, he has no authority except from the head office in Washington, he gets all his instructions from there, he is nothing more than a clerk.

Q. Are you making that statement, Mr. Smull, from seeing the records with respect to that situation, or just simply as a matter of personal knowledge on that in cases in which you have been connected?

A. Personal knowledge, yes, cases where I have called the New York man up, and before he can act he must consult Washington.

Q. You would not know there were exceptions at all?

A. Between the head office in Washington and here?

Q. Yes.

A. No, except, if I may add that when the War Trade Board did make exceptions to the clearance of a vessel they have arranged with us before hand, they tell us about it. It got one just before I left the office, and return guarantee had been modified.

Q. So that again is a matter that is subject to exceptions? A. Yes.

Q. You have told us about having looked through the records here and not found any lump sum charters during that period that were approved?

(Deposition of J. B. Smull.)

A. Of neutral boats.

Q. Have you found any that were denied, any record of any that were denied?

A. I simply looked through the approval sheets I had there. [177]

Q. I applied to Mr. Ring to permit me to have access to the records, or find out from the records what the situation was, and I received a letter from him referring me to Mr. Ira Campbell in Washington; can you explain the reason of that?

A. Mr. Campbell is the Admiralty counsel of the Shipping Board in Washington, and Mr. Campbell wrote us in regard to the "Brazil," I believe and we replied to it, and it is the custom of the Committee, as we have no advisory counsel of the Committee, when we get into legal points we don't talk to people, we refer them to the counsel; we know he has had something to do with that case, that probably is the reason of Mr. Ring's reply.

Q. You say Mr. Campbell wrote to you concerning the "Bayard-Beaver" matter? A. Yes.

Q. On his own initiative? A. I don't know.

Q. Was it a reply to a communication?

A. Oh yes, we heard from him first, we didn't know anything about it.

Q. Is that communication accessible?

A. I presume it is down in the office—yes, it is accessible, I don't know, it is a communication from our counsel to ourselves, and I don't know whether I could produce that in court, whether it would be within my jurisdiction.

(Deposition of J. B. Smull.)

Q. Counsel will advise what that privilege is?

A. I haven't any counsel here, this is not a Shipping Board now.

Q. It is immaterial to me, I demand the production, I would like to see it.

A. I will ask Mr. Campbell if I can produce it, Mr. Kirlin is not any more my counsel here than you are; if Campbell says it is all right you can have the letter and have our reply to it.

Q. Is there any reason why I could not have access to those records here and go over them personally? A. I don't know.

Q. As a member of that Board I now make the request?

A. I will ask Mr. Campbell. I will get him on the phone when I get back and I will ask him, and if he says yes I will be pleased to send them over to you.

Q. So you can have it accurate, I want to have an opportunity to [178] go over the records myself.

A. You want to know whether I can show you the exchange letters on the subject of the "Bayard-Beaver?"

Q. Yes. A. What else?

Q. I want access to the records of the chartering committee to ascertain what the records show with respect to the chartering of vessels during this period from November 3 to December 21?

A. You mean as to approvals and disapprovals?

(Deposition of J. B. Smull.)

Q. Yes, as it appertains to the facts we have been examining about in this case?

A. I think that would show the whole thing, we have a sheet that shows approvals and disapprovals every day. The application either shows an approval or disapproval.

Q. You did have a system prevalent during this date of permitting vessels to collect freights between Pacific Coast ports and Oriental ports, a certain rate outward and a certain rate backward, didn't you? A. Yes.

Q. That was $20 one way and $50 the other?

A. I think that was about what it was, yes sir, that is on these boats; this very boat; they could take the boats on time charter and then charge the rate to the cargo owners.

Q. Whoever was operating the boats could charge that rate?

A. Yes, then sometimes the rate outward would fluctuate; you say $20, that was about what it is, it has run up as high as $35 from the Pacific Coast out; the rate home has been pretty steady at $50.

Q. That was for vessels placed in berth?

A. Yes, sir, that was vessels placed on berth; that was for neutral vessels placed on berth that had been approved on time charter basis.

Q. You have spoken of the "Kina," "Peru," and another vessel as being owned by the East Asiatic Company, are you positive about that?

A. Yes, sir, a representative who did a great

(Deposition of J. B. Smull.)

deal of that chartering was in New York and had been done for years.

Q. By whom was the application made in those cases? [179]

A. They are generally made through their New York agent, Mr. Larsen.

Q. In these particular instances you don't know about that?

A. I can safely say through the East Asiatic Company, Mr. Jelstrom.

Q. You have a record that will show that?

A. Yes.

Q. I would like to see that record.

A. I don't know where they are, but I guess I can dig them out, it is about the same time, some time between October and December 15.

Q. With respect also to these charters I understand you to say that it required the concurrence of two members of the Committee? A. Yes.

Q. If they didn't concur it went through?

A. If two did not concur it went through as a disapproval; if two did concur or three it went through as an approval.

Q. So sometimes you folks disagreed?

A. Yes, we have our own opinions on things and fight it out.

Q. I presume you have so many of these things, or had during this period so many of these things to attend to that naturally you could not carry in your memory particular instances?

A. There were a great many of them, but the

(Deposition of J. B. Smull.)

ones that have had the long negotiations over, and the ones that have had any discussion and approval or disapproval of the boat, they stand out in my memory, but of course there are hundreds of them I could not recollect at all.

Mr. FRANK.—I think that is all for the present, but after you have finished with your redirect I believe we will adjourn until such time as we can get Mr. Smull back to examine his records, and for further cross-examination.

Redirect Examination by Mr. KIRLIN.

Q. Were there any particular abuses which were designed to be corrected by the appointment of your chartering committee?

A. I don't know whether you can call it abuses. [180]

Q. Practices?

A. The chief practice the government did not like was the continued advancement of freight rates to leave this country.

Q. One of the objects was to obtain a leveling of those rates downward, to have it uniform?

A. There was not any discussion about it but that was what I always understood, that was the worst feature.

Q. One of your first determinations was fixing approximately what you considered a fair rate on these Pacific vessels of 45 shillings per ton deadweight on time charter? A. Yes.

Q. Was it part of your policy therefore not to favor charters which worked out at higher fig-

(Deposition of J. B. Smull.)

ures, or berthings that worked out higher figures?

A. Yes, anything that we thought would control the situation we adopted that plan.

Q. This offer that has been testified to of $400-000 for a round trip would of course have worked out a much larger figure than your 45 shilling time charter?

A. I haven't figured it but offhand I would think it would considerably.

Q. It would have been figured if you had had an application for approval? A. Yes.

Q. Whether approval had been sought and would have been granted would have depended on how the rate worked out as compared with your 45 shilling time charter? A. Yes, sir.

Q. Which was your maximum figure at that time?

A. Yes.

Q. Had this relation to neutral vessels chiefly, or did it also relate to American vessels?

A. Neutral vessels.

Q. So that when you testified that you considered individual charter terms in each case I take it that your consideration would have had relation to the rate as well as to the other terms of the charter party. A. Yes, sir.

Q. I understand from the earliest at least there were two members—

Mr. FRANK.—If you will allow me, you are leading the witness.

Q. You have spoken of disagreements amongst the members about time [181] charters, did those

(Deposition of J. B. Smull.)

relate to the allowance of higher charters which amounted to higher rates as they worked out more than 45 shillings on the Pacific?

A. No, no differences in rates, what different clauses would give the charterer more of a concession, or owner more of a concession, but the rates were agreed upon; we have never had a discussion over rates until there came to be a general discussion, whe it looked as if the rate should be lowered or raised, but when the rate was once decided on that was a basic rate; but a charter-party would come in, several charter-parties have come in with the same rate but they will have all sorts of clauses rung in that affect the rates, affect the conditions, that is where there would be arguments pro and con as to whether those clauses should be allowed to stay in.

Q. Whether the particular clauses amounted to an increase in rates?

A. Yes, you would be surprised to find out how many things were rung in.

Q. You had a good deal of experience in chartering of steamers, questions arising on the purchase of charters, I suppose, in your business?

A. I have.

Q. I believe you are a member of the Produce Exchange?

A. The steamship committee of the Produce Exchange, arbitrations of steamship matters are brought up before them.

(Deposition of J. B. Smull.)

Q. Is there any commercial custom as to measuring claims for damages?

FRANK FRANK.—Objected to.

Q. On offers of charters which are not affected in the first place, is there a custom as to measuring claims for damages?

A. That is the Arbitration Board of the Produce Exchange?

Q. No, is there a custom of measuring claims on damages by reference to unaccepted offers for charters?

Mr. FRANK.—Objected to.

A. There is a general practice on arbitrations for the different committees in the New York Produce Exchange that consequential [182] damages are not considered. In other words a trade that has not been put through, we consider the man's actual loss, what he would have lost on the local market and not on a possible trade that might have been made between a ship owner and a charterer. It is not law with us down there, it is equity, common sense. For instance, until more recently before the main arbitration committee the man has got to plead his own case, we are all members of the association, he can't have his attorney with him. I don't suppose we go contrary to the absolute law we know, but it is a matter of equity and common sense.

Q. What is the customary practice of making claims where no deal is concluded?

(Deposition of J. B. Smull.)

A. The man has actually lost his money, the time charter market is the market on which the thing is figured. If he loses two or three days he is entitled to what he could have earned under a time charter, unless he is tied up to an agreement on a different form of charter which specifies so much demurrage, that qualifies it, but where the trade is not made we have not considered the loss the man might have made on a possible trade.

Recross-examination by Mr. FRANK.

Q. It is a fact, is it not, that on these time charters that the Committee compel the owner to take the charter at a certain rate and is permitted to charge a very much higher rate for the cargo?

A. He is allowed to charge a rate that will give a fair profit.

Q. You have testified to $50 and $35 on a round trip?

A. I would like to qualify that, $20 and $50.

Q. That is $70 on a round trip on a deadweight trip? A. Yes.

Q. That is more than 45 shillings?

A. Yes, he runs his chances on the deadweight charter.

Q. The Government also in commandeering vessels charges a very much higher rate to cargo owners in carrying their cargo, does it not?

A. I would not say very much higher, there is not very much profit, the Government does not charge as much as the individual, [183] the policy has not been to make a large amount of money,

(Deposition of J. B. Smull.)

they charge enough to make a fair working profit, including the overhead as we say.

Q. Considerably more than 45 shillings?

A. If you take a boat on the Pacific Coast, yes.

Q. Mr. Kirlin then was wrong when he suggested that the purpose of this practice was to bring down the rates to 45 shillings to the cargo owner?

A. To bring down the rate to the cargo shipper, yes, the cargo shipper pays more than 45, the time charterer pays 45.

Q. It is not the tendency suggested to Mr. Kirlin to bring down the rate to 45 shillings?

A. The cargo rates, they allow a little more. On this freight boat when we chartered her we took her out to Australia and brought her back with a full cargo of wheat, we charged on that wheat just enough to pay for the hire of the ship and the overhead.

Q. Do you recollect what the rate was?

A. 95 shillings.

Q. Charter rate?

A. No, 95 shillings a ton on the wheat.

(By Mr. KIRLIN.)

Q. Per ton delivered? A. On the wheat.

(By Mr. FRANK.)

Q. One on the deadweight capacity and the other on the cargo capacity?

A. The time charter is on the tonnage deadweight capacity including cargo, bunker and stores; the other is only on cargo, so he has to have a little

(Deposition of J. B. Smull.)

more for the deadweight of bunkers; in that round trip he has to take 1000 tons.

Q. Take this vessel for instance which in these telegrams shown to you is quoted 5300 tons deadweight and the rate permitted, say it is $20 and $50, which would make $70 for the round trip, that would make $371,000 for the round trip for that vessel? A. Gross freight.

Q. Not so very much less than $400,000, is it?

A. No.

Q. So there could not have been any policy such as that suggested by Mr. Kirlin as to move you to deny $400,000 and permit the [184] $371,000?

A. Except we didn't want it on gross charter at all, we wanted it on time charter. Mr. Frank, you are not right on that figure because she has only a carrying capacity of 4200 tons, you don't get paid on that, only on the gross tonnage of the cargo carried, you have to go all the way across the Pacific and back, she only gets paid on her cargo so that would be about $290,000.

Q. When she touches a second port you allow an increase on that?

A. Well, it all depends on the conditions, at times there is an increase on two or three ports.

Q. There is a reason for that?

A. A special reason.

Q. It is more expensive?

A. Yes, sometimes a man will trade for a boat for three ports discharge, then he will want another one, they will have to dicker on the extra

(Deposition of J. B. Smull.)

cost of going into that port. That figure of $370,000 was wrong, she would not gross $200,000.

Mr. FRANK.—We can work the figures out on that.

(By Mr. KIRLIN.)

Q. Mr. Frank put to you some figures and multiplied the whole by $70 a ton?

A. The outside would be about $290,000.

Q. So there was an excessive rate allowed?

A. Yes, with the $290,000, all expenses have to be taken out, the owner would have to pay all the port loading and discharging expenses, everything pertaining to that cargo the owner has to pay, so he doesn't make anything like that.

Q. On a time charter he does not have to pay those?

A. No, the charterer pays all of it on time charter.

Q. Except the wages, provisions, stores and engine stores? A. Yes.

(By Mr. FRANK.)

Q. There is a difference in your mind between a gross charter and lump sum charter?

A. Well, it all depends on what form of charter, you can have a gross lump sum or you can have a time charter lump sum; a gross form of time charter and a gross form on rates is the [185] same; your gross form is the number of tons multiplied by what you are allowed on the gross charter.

Q. Whether or not that would be approved depends, as I understand you in reply to Mr. Kirlin, upon the provisions of the charter party itself out-

(Deposition of J. B. Smull.)

side of the fact that it is a lump sum?

A. Yes, sir.

(By Mr KIRLIN.)

Q. Particularly as to how high the lump sum is, how it worked out as compared with your 45 shillings? A. Yes.

Q. Did you compute about how much the value of the use of the vessel per day would be on the basis of 45 shillings per ton deadweight on time charter?

A. I have.

Q. How much was it?

A. It is $1888 per day, that is at 45 shillings per ton, deadweight capacity of 5200 tons.

Adjourned for purpose of permitting Mr. Smull to see if he can permit Mr. Frank to examine his records, subject to his further cross-examination.

[Title of Cause.]

New York, Oct. 16, 1918.

Met pursuant to adjournment.

Present: Mr. WOOLSEY and Mr. FRANK.

Recross-examination of J. B. SMULL continued.

(By Mr. FRANK.)

Q. Mr. Smull, at the time of our adjournment last time you were going to make application to Mr. Campbell to see whether or not I could be permitted to examine your records. I understand you did make application to Mr. Campbell?

A. I did.

(Deposition of J. B. Smull.)

Q. And received a telegram in reply?

A. Yes, sir. [186]

Q. This is the telegram (handing witness paper)?

A. This is the telegram, the original and a copy.

Mr. FRANK.—I offer the telegram in evidence.

Mr. WOOLSEY.—Objected to as irrelevant and immaterial.

It reads as follows:

918 Oct 1 AM 4 48

C21 W 12 GOVT NL 4 EX

WA Washington DC Seht 30

Smull

Chartering Committee Custom House New York NY Law Division Shipping Board Has no Objection to Your Showing Nathan Frank List of Approved and Disapproved Charters Between November Third and December Thirty First Nineteen Eighteen Stop I Have Never Seen Your Files and Know Nothing of Their Contents or General Information Contained Therein so am Not in Position to Definitely Advise Whether You Should Let Frank Examine Them Generally Stop if He Represents Parties Having or Intending to Present Claims Against United States or if Your Files Contain Information Which Should Not be Given Publicity Your Committee Should Exercise Its Own Discretion as to Permitting Him to Make General Search of Files Stop You Should However Give Him Full Information and Exhibit to Him All Documents Bearing on Bayard Beaver Demurrage Controversy.

(Deposition of J. B. Smull.)

CAMPBELL ADMIRALTY COUNSEL SHIPPING BOARD.

Recd. New York Chartering Committee U. S. Shipping Board Oct. 1 1918

Q. I understand that subsequent thereto your Board had a meeting to consider whether or not I was to be permitted to examine your records?

Mr. WOOLSEY.—Not your Board, your Committee.

Q. Your committee? A. Yes.

Q. And the Committee decided that I was not to have that privilege? A. Yes. [187]

Q. At your former hearing you testified that you went through the records from the time that you went on the Committee and found no approval of steamers under foreign flag, round time charters; do you remember so testifying?

A. Round time charters—it should not be time charters, it ought to be round trip charters.

SMULL—Recross.

Mr. FRANK.—I ask that that correction be made.

Q. Since then I understand you have also made examination and found no cases of disapproval of any such charters?

A. Yes sir, between, as you requested, the dates of November 3d and December 21st.

Q. Didn't you make an examination to cover the same time to which you testified in this case?

A. Yes, that is the time I believe.

(Deposition of J. B. Smull.)

Q. The time you testified to here was the time you entered upon the duties in the Chartering Committee—"From the time I went in there no approval of steamers on round trip steamers up to the first of the year"? A. Yes, that is all right.

Q. "Yes, I went through our list of approvals up to about the 1st of the year and from the time I went in there are no no approvals of steamers under foreign flag, round trip charters."

A. Round trip charters; we use the words "round trip charters" to mean time charter round trip, and the record of that answer seems to be a little confused because I did not mean no record of round trip time charters; there was no record of charters for round trip on the gross form of charter.

Q. Is there any record of any lump sum charters during the entire time mentioned, either of approval or disapproval? A. Not for round trip, no.

Q. Am I to infer from that that there may be some others in the record for approval or disapproval of lump sum charters for a single trip either way? A. Yes, there were.

Q. That is the few that you referred to as being homeward? [188]

A. Homeward, yes.

Q. Homeward bound? A. Yes, sir.

Q. Otherwise there is nothing in the record?

A. Nothing else.

Q. That covers the entire proposition without any

(Deposition of J. B. Smull.)

distinction at all; you are making a distinction of round trip that covers the whole thing

A. Gross form.

Q. Lump sum charters

A. On lump sum charters.

Q. You also were to produce a letter written by Mr. Campbell respecting this matter to you on the 3d of June? A. Here it is.

Witness produces letter.

Mr. FRANK.—I offer that letter in evidence.

Mr. WOOLSEY.—Objected to as irrelevant and immaterial.

It reads as follows:

UNITED STATES SHIPPING BOARD.
Washington.

June 3, 1918.

Mr. J. B. Smull,
Chartering Committee,
United States Shipping Board,
Washington, D. C.

Dear Mr. Smull:

BEAVER—BAYARD COLLISION.

On November 3, 1917, the Norwegian motor ship Bayard was in collision with the American steamer Beaver. The Beaver has admitted fault, and there is now pending in litigation the question of the demurrage which the owner of the Bayard is entitled to receive for the period that the Bayard was laid up for repairs. This extended from November 3 to December 21. Damages are being asked in the

sum of $200,000, at the rate of $3,888 per day.

The owner of the Beaver, the San Francisco and Portland Steamship Company, is informed that it would not have been possible for the Bayard to have been operated during the period of repairs, owing to settlement of a controversy which was then pending with the Norwegian government. [189]

The George Washington has been laid up in San Francisco harbor for many weeks prior to the collision, and so continued for a considerable time thereafter. The Norwegian steamer Storvicken was similarly laid up at Seattle. It is the desire of the owners of the Beaver to place before the United States Court at San Francisco full information as to the status of the Norwegian ships, so far as concerns their ability to operate during the period from November 3 to December 21. It is of interest to the Law Division of the Shipping Board that such information be given the Court, because we desire to avoid the precedent of any judgments in the United States courts fixing heavy demurrage damages in collision cases. The Board is soon to be confronted with voluminous litigation in collision cases, and it is to its interest to have the demurrage rates kept down. The owners of the Beaver would like to call some one who can testify to the following information:

(1) The date when the Bayard first applied for bunker fuel, and by whom such application was signed.

(2) The date when the owners of the Bayard executed the required agreement promising to re-

turn to the port of San Francisco and here discharge her cargo, and the parties by whom this was signed.

(3) If this last-named agreement was signed by the captain of the vessel and the agents for her owners, when, if at all, and in what form authority was presented from the owners for the execution of the same.

(4) The date when the permission for bunker fuel was granted.

(5) Any other information throwing light on the question whether the Bayard was free to sail between November 3 and December 21. She did not actually sail until January 18.

The San Francisco and Portland Steamship Company is also [190] seeking the following information respecting the motor ship Brazil, which entered the port of San Francisco on November 13, 1917, and did not sail until after January 14, 1918, viz.:

(1) The date when the Brazil applied for permission for bunker fuel.

(2) The date of the execution of agreement to return to the port of San Francisco and discharge cargo.

(3) The date of permit.

(4) The names of parties who executed the application and agreement on behalf of the owner, and information concerning the authority disclosed to Mr. Corey, the San Francisco representative of the War Trade Board, so to execute.

(Deposition of J. B. Smull.)

Also, can you throw any light upon the whereabouts of the following vessels, between November 3 and December 21, and any information as to whether they were prevented from operating by the same causes which may have prevented the use of the Bayard:

S. S. "BALZAC" S. S. "BRIO"
S. S. "BAMSE" S. S. "BRISK"
S. S. "BOR" S. S. "BRUNO"
S. S. "BRILLIANT"

Perhaps Mr. Carey Cook is in position to give this information. If not, is there anyone in your office whose deposition could be taken? The case is set for trial now on June 10.

Very truly yours,,
IRA A. CAMPBELL,
Admiralty Counsel.

Q. I presume, Mr. Smull, as a member of that Board you feel interested, as well as Mr. Campbell, in the desire of the Board to avoid the precedent of any judgments in the United States Courts [191] fixing heavy demurrage damages in collision cases, for the reasons stated in that letter?

A. Yes.

Q. You have produced here the card memorandum of your office respecting the "Peru," "Arabian" and "Kina"? A. I have.

Q. Those are the vessels concerning which you testified on your direct examination as having been chartered on lump sum charters from the Orient to San Francisco, are they not? A. Yes.

(Deposition of J. B. Smull.)

Q. The "Kina" it appears from this her homeward charter, concerning which you testified, was approved on the 7th of December, 1917?

A. Yes.

Q. And subsequently she went upon a time charter for the Government under date of August 2, 1918? A. Yes, sir, at 35 shillings time charter.

Q. To Hawaii? A. And return.

Q. And return. The "Arabian" was approved on the 2d day of August, 1918, for a like voyage?

A. Time charter for the Shipping Board at 35 shillings.

Q. To Hawaii? A. Yes, sir.

Q. The "Peru" was approved for homeward voyage on the 8th day of December, 1917, Philippines to San Francisco $50, and $15,000 additional extra loading ports, that is right, is it. A. Yes, sir.

Q. And she subsequently went under time charter to the Shipping Board on the 2d day of August, 1918, Hawaii and San Francisco 35 shillings?

A. Yes, sir, for the round trip.

Q. The "Kina" was also $50?

A. Yes, sir, on a voyage from Manila to San Francisco the rate was $50, gross form charter.

Q. $50 on account of deadweight, isn't it?

A. Yes, sir, $50 per ton on her deadweight cargo capacity.

Q. And the same in the case of the other vessels?

A. Same in the case of the "Peru" for this homeward voyage.

(Deposition of J. B. Smull.)

Redirect Examination by Mr. WOOLSEY.

Q. At the meeting of the Chartering Committee at which it was voted that Mr. Frank would not be given the privilege of examining [192] your files did you vote or participate in the meeting?

A. I did not vote.

Q. After the Committee had decided that this permission should not be granted was a report of the decision made to the Shipping Board?

A. A wire was sent to the Shipping Board that the Chartering Committee had decided that the full records showing all approvals and disapprovals made on all business from the first of the year could not be shown Mr. Frank.

Q. Did you receive a telegram from the Shipping Board or anyone connected with it, in answer?

A. We received a reply from Mr. Burling, the chief admiralty counsel of the United States Shipping Board.

Q. Is this the reply (handing witness paper)?

A. Yes, sir, this is the reply.

Mr. WOOLSEY.—I offer the telegram in evidence.

It is marked Claimant's Exhibit "X" and reads as follows:

Claimant's Exhibit "X."

AN 35 GOVT 1918 Oct 5 PM 5 14
A484 WASHINGTON DC 438P 5
Chartering Committee
Custom House New York

Approve your decision not allow Frank examine

(Deposition of J. B. Smull.)

file but approve showing all letters relating to case in question and furnish all information on subject in your possession.

BURLING,
Shipping Board.

Q. Have you in pursuance of Mr. Burling's suggestion shown Mr. Frank all letters relating to the case in question, furnished him all information on the subject in your possession?

A. I have, everything he requested I have.

Q. On this case?

A. Yes, except our full record of approvals and disapprovals, as to which I have testified.

Q. Regarding this particular case of the "Beaver," in which you [193] are giving evidence now, you have shown him all the information on the subject in your possession? A. Yes.

Q. And all letters relating to this particular case?

A. Yes.

Q. The "Arabian," did I understand you to say in answer to Mr. Frank's question that there was not any homeward charter on that vessel?

A. Yes. Her previous business before she was fixed to the United States Shipping Board on time charter was a cargo loaded in the East for account of the owners.

Recross-examination by Mr. FRANK.

Q. What you did show me over there was just the telegrams and papers that have been put in evidence? A. Yes.

(Deposition of J. B. Smull.)

Q. That is all? A. Yes.

Q. I had no opportunity to see your approval list or disapproval list, or any papers in the custody of the Committee?

A. No, but you saw all papers bearing on this question outside of the approval and disapproval lists.

Q. By that you mean these papers we are talking about? A. Yes.

Q. Did I understand you to say the "Arabian" was loaded on berth for account of the owners?

A. I believe she was. We have no record of the approval by the Board to show she was loaded in the East before we started in; we started in about the first of October.

Q. That loading was not in San Francisco?

A. No, loaded in the East for San Francisco.

Q. For San Francisco but on the berth?

A. On the berth, yes, for owners' account, no charter covering the transaction.

Mr. FRANK.—That is all. [194]

[Title of Court and Cause.]

Southern District of New York,—ss.

I, C. May Hudson, a Notary Public in and for the County of New York, State of New York, duly appointed and empowered to act in and for the County of New York, State of New York, Southern District of New York, duly authorized under and

by virtue of the Acts of Congress of the United States and of the Revised Statutes to take depositions *de bene esse* in civil cases depending in the Courts of the United States, do hereby certify:

That the foregoing deposition of J. B. Smull was taken on behalf of claimant before me, at No. 27 William Street, Room 1614, New York City, on September 30, 1918, that an adjournment was taken to October 16 for further examination; that I was attended upon the taking of said depositions by J. Parker Kirlin, Esq., & John M. Woolsey, Esq., for the claimant, and by Nathan Frank, Esq., for libelant; that said witness was by me first cautioned and sworn to tell the truth, the whole truth and nothing but the truth, and that he was thereupon examined by counsel present; that I took down his testimony in shorthand and caused the same to be transcribed in typewriting by a person under my personal supervision and who is not interest in this cause. [195]

I have retained the said deposition in my possession for the purpose of delivering the same into the United States Post Office in the City of New York in an enclosed post-paid wrapper, registered, to the Clerk of the above-entitled court on October 19, 1918.

I further certify that I am not of counsel or attorney for any of the parties in said deposition or caption named, nor in any way interested in the event of the above suit.

IN TESTIMONY WHEREOF I have hereunto set my hand and official seal this 19th day of October, 1918.

[Seal] C. MAY HUDSON,
Notary Public Kings Co. No. 241.
Cert. filed in N. Y. Co. No. 211.
My commission expires March, 1919.

[Endorsed]: Filed Dec. 18, 1918. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [196]

[Title of Court and Cause.]

Stipulation Dispensing with the Taking of the Deposition of J. Beaver White.

For the purpose of dispensing with the taking of the deposition of Mr. John Beaver White, it is stipulated and agreed by and between Nathan H. Frank, Esq., proctor for the libelant in the above-entitled cause, and Walter S. Penfield, Esq., acting for and in behalf of the respondent and the claimant in said cause, that if the deposition of said John Beaver White were taken he would testify as follows:

That he is now and has been since its organization a member of the War Trade Board of the United States, being named as such member as representative of the United States Food Administration; that in the month of November, 1917, Frank C. Munson was a member of said War Trade Board, being a representative of the United States Shipping Board thereon; that he, Mr. White, was ac-

quainted with one G. W. McNear; that he received a telegram from Mr. McNear dated November 24, 1918, referring among other things to a contemplated voyage of the [197] Norway-Pacific motor ship "Bayard" to New Zealand and return, and requested assistance in getting approval of the voyage; that upon receipt of the same he turned it over to Mr. Munson for attention because of the fact that the matters discussed in said telegram were within the line of work then being handled by Mr. Munson.

It is further agreed that this stipulation may be received in evidence in the above-entitled cause as and for the testimony of said John Beaver White, waiving all objections to the same based upon matter of form, but reserving all objections as to competency or relevancy.

Subscribed in triplicate copies this 3d day of October, 1918.

NATHAN H. FRANK,
Proctor for Libelant.
WALTER S. PENFIELD,
Acting for and in Behalf of Respondent and Claimant.

[Endorsed]: Filed Dec. 18, 1918. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [198]

[Title of Court and Cause.]

No. 16,303.

(Additional Testimony Taken on Submission of Cause.)

Wednesday, December 18, 1918.

Counsel Appearing:

For the Libelant: NATHAN H. FRANK, Esq.

For the Respondent: FARNHAM T. GRIFFITHS, Esq.

Mr. FRANK.—Your Honor will remember that this case was tried up to a point where Mr. Griffiths wished to take some depositions in the East. He took those depositions. I don't know about his introducing them. In the meantime there are some little matters that I wish to present to the Court.

I have here a charter-party, under date of the 22d day of March, 1918, of the Danish steamer "Transvaal," which Mr. Griffiths is prepared to admit was made and executed and approved by the chartering committee of the board and inter-allied chartering executive committee of London.

Mr. GRIFFITHS.—The chartering committee. Was it approved, as a matter of fact, by the inter-allied chartering executive committee?

Mr. FRANK.—Well, as a matter of fact, the voyage was performed under the charter-party.

Mr. GRIFFITHS.—Yes, I know that.

Mr. FRANK.—We ask that that be admitted in evidence; we [199] will call it Libelant's Exhibit "A" as of this date.

Mr. GRIFFITHS.—By the way, Mr. Frank, with regard to the offer of that charter-party, dated March 22, 1918, I consent to that, that is, I stipulate that the charter-party was executed and that it was approved by the chartering committee of the Shipping Board, and that the vessel sailed under that charter; that is, I do not question the charter-party, and that that is a true copy. My stipulation does not go to any consent to its materiality. I claim that it is away beyond the period examined into in this case, and in the depositions taken in New York.

Mr. FRANK.—I understand that.

Mr. GRIFFITHS.—What I mean was that I know the charter was executed, but I claim that it is immaterial and irrelevant and was offered too late and we could not examine our witnesses in the East upon it.

Mr. FRANK.—That was an entirely different proposition. It was offered just as quickly as I got it. I showed it to you just as quickly as I got it. I surely did not hold it out.

Mr. GRIFFITHS.—I don't question that at all.

Mr. FRANK.—And if those fellows had allowed me to examine their record I would have had it right there.

Mr. GRIFFITHS.—I understand that in the East they asked you if you wanted any further examination of Mr Smull beyond the end of December; this examination covered up to the end of the December.

Mr. FRANK.—I asked them for a full examination of all of their records and they declined to

let me have them; then it was limited to January 1st, and even that was declined.

Mr. GRIFFITHS.—Well, the record will show what the situation is in that regard. [200]

Mr. FRANK.—On page 72 of the record, your Honor, we have an answer by Mr. Kutter on the 12th and 13th lines, in which he says: "She has carried in mixed cargo 3000 tons of copra, about 1500 tons of sugar, and a couple of hundred tons of cocoanut oil." It is agreed that be amended to be 3047 tons of copra —

Mr. GRIFFITHS.—I have it here 3042, Mr. Frank; that must be an error.

Mr. FRANK.—No, I don't think so; it says here 3047.

Mr. GRIFFITHS.—Well, whatever the manifest shows.

Mr. FRANK.—Yes, whatever the manifest shows. 3047 tons of copra, 1610 tons of sugar, and 203 tons of cocoanut oil.

The COURT.—You can just mark those figures on the original; the Reporter can correct that upon the original, or better still, just paste a slip in on that page, so my attention will be called to those corrected figures.

Mr. GRIFFITHS.—That is admitted subject to our examination of the manifest.

Mr. FRANK.—That is all.

Mr. GRIFFITHS.—I will introduce a stipulation entered into Washington between Mr. Frank and our representative there, dispensing with the deposition of J. Beaver White and making an

agreed statement as to what he would have testified to if called.

Also the deposition of Richards, a witness on behalf of the respondent and claimant, together with the agreement as to the time and place of taking it. Also the deposition of J. B. Smull, taken on behalf of the claimant in New York on September 30, 1918.

Mr. FRANK.—Now, if your Honor please, the balance of the testimony we intended to take this morning related to the question of over time and work on the engines. We might possibly take that today or tomorrow by deposition. With that we will submit the cause. I don't know that it would be of any value to attempt to argue the case orally to your Honor; there is a great deal of detail to it. I am content to brief it. I have my brief [201] practically finished and am ready to file it. Mr. Griffiths can take such time as he deems desirable in which to reply.

Mr. GRIFFITHS.—I suppose we had better set some time in order to start it running anyway.

Mr. FRANK.—You can fix your own time.

Mr. GRIFFITHS.—I will take 15 days after the filing of your brief, and then perhaps get further time from you.

Mr. FRANK.—I will have mine in in sight of 15 days.

There is an element of physical damage, the repair damage, that we introduced no proof upon. It was expected that we would get together and agree on that; we tried to agree last night and we

rather ran against a snag; I don't know if we can agree upon it, or not; if not it will be understood that that will be referred to the Commissioner.

I want to amend article 4 of the libel wherein it alleges that the same will exceed the sum of $200,000, by making it specifically, $348,000; and also to amend the prayer to conform thereto.

Mr. GRIFFITHS.—I have no objection to the amendment upon the understanding, which Mr. Frank now confirms, that the amendment is not given to conform to the proof, because I do not admit that there has been any proof of any such amount, or of any amount in excess of the original claim; and also upon the understanding that there is going to be no request for any change in the bonds now outstanding.

Mr. FRANK.—What I want to make clear is that the amendment is made just the same as if the amendment had been asked for before any proof had been offered.

Mr. GRIFFITHS.—Yes; in other words, neither of us make any claim for the present as to what has been proved.

Mr. FRANK.—That is it; neither one is making any claim as to the proof by reason of this amendment, but the amendment is made as if it had originally been put in the libel in that amount.

[Endorsed]: Filed Dec. 26, 1918. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [202]

[Title of Court and Cause.]

(Depositions of Joseph Blackett and Frank H. Evers.)

BE IT REMEMBERED: That on Thursday, December 19, 1918, pursuant to stipulation of counsel hereunto annexed, at the office of Nathan H. Frank, Esq., in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc., Joseph Blackett and Frank H. Evers, witnesses called on behalf of the claimant.

F. P. Griffiths, Esq., appeared as proctor for the claimant, and Nathan H. Frank, Esq., appeared as proctor for the libelant, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the depositions of the above-named witnesses may be taken *de bene esse* on behalf of the claimant at the office of Nathan H. Frank, Esq., in the Merchants Exchange Building, in the city and county of San Francisco, State of California, on Thursday, December 19, [203] 1918, before Francis Krull, a United States Commissioner for the

(Deposition of Joseph Blackett.)

Northern District of California and in shorthand by Charles R. Gagan.

(It is further stipulated that the depositions, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived, unless objected to at the time of taking said depositions, and that all objections as to materiality and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof are hereby expressly waived.)

Deposition of Joseph Blackett, for Claimant.

JOSEPH BLACKETT, called for the claimant, sworn.

Mr. GRIFFITH.—Q. What is your address?

A. 454 California Street.

Q. That is your business address?

A. My business address.

Q. What is your business?

A. Surveyor to Lloyds Register.

Q. Did you have anything to do with relation to the repairs on the Motor Ship "Bayard" after her collision with the "Beaver" last year?

A. Yes.

Q. Will you just explain what that relation was?

Mr. FRANK.—We object to that because the

(Deposition of Joseph Blackett.)

agreement is the best evidence of what his relation was.

A. It was on behalf of the underwriters of the "Beaver," to take particulars of the damage.

Mr. GRIFFITHS.—Q. What do you mean by taking the particulars of the damage?

A. Well, to see after the extent of the damage and to agree with the recommendations for her repairs. [204]

Q. Where were the repairs being done?

A. What part of the ship do you mean?

Q. No, where was she being repaired?

A. At the Union Iron Works at the Potrero.

Q. During what period of time was she there under repair, that is, how long?

A. From November 9 until December 21, 37 days.

Q. Does that include or exclude the time that she was on the dry-dock?

A. That includes the time she was on the dry-dock.

Q. That is to say, the dry-docking time and the repairing time overlap?

A. The dry-docking was within the period of November 9th to the 21st of December.

Q. Will you state again, Mr. Blackett, what days she was under repairs, by dates?

A. November 9 was the beginning of the repairs, the first day there was any work on the ship; the last date when the repairs were completed, when the men were working on board, was December 21st.

(Deposition of Joseph Blackett.)

Q. Was there any overtime work?

A. There was overtime work on the dry-dock.

Q. Can you say how much overtime, how many days of overtime?

A. Three; I think there were three nights they worked on the dock.

Q. Can you tell us how much time would have been saved if overtime had been worked throughout, giving the estimate conservatively?

A. Well, if they had worked a double shift on that particular job they could have cut the time one-third, or more than one-third, if they worked two shifts.

Q. Do I understand you to say that one-third is a conservative estimate?

A. One-third is a conservative estimate.

Q. How much would that have increased the expense, approximately?

A. That would have doubled up.

Q. If they worked a double shift for that time?

A. Yes, it would have doubled up the expense.

Q. Was any work done upon the "Bayard" there, other than repairs necessitated by the collision?

A. Yes, there were a number of [205] owner's repairs in the engine-room, building up of platforms, stiffening up of dynamos—dynamo engines—and the ordinary overhauling of the engines.

Q. Was there any need of overhauling the engines on account of the collision?

A. Not for damage, not on damage account.

(Deposition of Joseph Blackett.)

Q. Well, on any account arising out of the collision, was there any need?

A. We agreed to that, all parties that were on the survey at the time.

Q. That is, agreed that there should be no overhauling on account of the collision?

A. The list of work was drawn up and signed by all parties in Mr. Frank's office here.

Q. And it did not include the overhauling of the engines?

A. That list did not include the overhauling of the engines.

Q. Will you state whether or not you had any authority as to directing whether there should be overtime worked, or not?

Mr. FRANK.—That is utterly immaterial; that is his conclusion. A. None whatever.

Mr. GRIFFITHS.—Q. Was it ever indicated or suggested to you by surveyors or others there representing the ship that there should be overtime used? A. No, none at all.

Mr. FRANK.—Just a moment: That is also immaterial and I object to it on that ground.

Mr. GRIFFITHS.—I think that is all.

Cross-examination.

Mr. FRANK.—Q. Now, Mr. Brackett, of course, previous to November 9th, and between November 3d and November 9th, you folks were engaged in surveying the vessel and ascertaining the damage

(Deposition of Joseph Blackett.)

in order to agree on specifications for the repairs, were you not? A. Yes.

Q. So that from November 3d to the time she went to the dry-dock, that time was necessarily engaged in order to prepare for the repairs?

A. We made one survey; if I remember rightly, [206] it was the 6th; that was the first survey of the vessel. It was made by the owner's classification and the underwriter's representatives.

Q. You say on the 6th you made a survey?

A. To the best of my recollection it was on the 6th.

Q. And previous to the 6th there was of course inquiry made—When were you first called in by these parties to ascertain whether or not you would serve in this matter?

A. I don't remember, Mr. Frank, but the first date of survey in my book is November 6th.

Q. But previous to that you were called in and there were negotiations back and forth to see how this thing could be arranged, were there not?

A. None at all, no.

Q. With respect to you.

A. I was called right on the survey.

Q. When, on the 6th?

A. Probably a day previous to the 6th; I made arrangements to make the survey on a certain date.

Q. You don't know whether it was the 3d or the 4th?

A. I know the survey was held on the 6th.

(Deposition of Joseph Blackett.)

Q. But you don't know whether the negotiations looking to the making of those arrangements proceeded promptly on the 3d and culminated on the 6th?

A. I don't remember about that. I am going by my note-book as holding the survey on the 6th.

Q. Of course, it is always necessary to ascertain the conditions and arrive at some sort of an arrangement before an agreement for a survey of that sort is made?

A. Not always; you can get half an hour's notice sometimes.

Q. That is, between you and these other people, but as between the parties themselves, I mean the "Bayard" people and the "Beaver" people, those things are not done overnight, are they?

A. I am not familiar with what occurred there.

Q. You only know when you were called in?

A. I only know when I went to the case; whether I got an hour's notice or a day's notice I could not tell you. [207]

Mr. GRIFFITHS.—It is obviously not competent for him to testify to negotiations in which he was not concerned.

Mr. FRANK.—Certainly it is not competent but I do not wish the inference to be drawn that this thing was not promptly taken up from the fact that this man does not know what happened before.

Q. The Union Iron Works were very busy at that time, were they not?

(Deposition of Joseph Blackett.)

A. I have not any idea of their state of work at that time.

Q. With respect to overtime, you say the expense would have doubled?

A. I should say doubled, yes, if they had worked a double shift.

Q. Overtime, anyhow, is double time, isn't it?

A. If you work it in two shifts, 8 hours, the two shifts get the same pay.

Q. The two shifts? A. Yes, of 8 hours each.

Q. But for overtime they get double pay and that makes the cost trebled instead of doubled?

A. If they work them right through.

Q. That makes treble cost instead of double?

A. Treble cost.

Mr. GRIFFITHS.—Please note the "if" there.

Mr. FRANK.—Who is going to note it?

Mr. GRIFFITHS.—I want the court to note it.

Mr. FRANK.—Q. And besides that there is a loss in efficiency, isn't there?

A. In working men right through, yes.

Q. A very considerable loss?

A. It is hard to estimate the loss.

Q. It is difficult to tell what it is but it is considerable?

A. It is quite some, yes. It is only natural to imagine that a man working 8 hours during the day and then continuing another 8 hours at night, he is not going to do as much at night as he will during the day.

(Deposition of Joseph Blackett.)

Q. And another fact is, and taking it from your experience, and not arguing, that it is natural, you know as a matter of fact that they do not accomplish nearly as much, don't you?

A. They do not accomplish nearly as much. [208]

Q. Whether that is from lack of nervous force or whether it is owing to a disposition to soldier at night, the fact remains?

A. I think fatigue enters into it.

Q. Fatigue enters into it, and soldiering enters into it too? A. Possibly.

Q. They cannot be supervised in the same way: Isn't that right?

A. Yes, but I think it would be more than fatigue.

Q. Now, with regard to the repairs in the engine-room, the overhauling, that did not interfere with or delay the other repairs, did it?

A. That was gone ahead with at the same time.

Q. It did not interfere at all?

A. I didn't see the machinery at all. Not being concerned in the classification of the vessel, I did not bother with the machinery end because we eliminated that right from the start.

Q. Well, so far as your observation went, it did not interfere at all or delay the other repairs?

A. Well, it could not have interfered with repairs being at another end of the ship—absolutely.

Q. Now, with respect to the necessity of overhauling the engines by reason of the damage, you know as a matter of fact that the vessel received a very severe blow, do you not?

(Deposition of Joseph Blackett.)

Mr. GRIFFITHS.—Just a moment; I don't know that he does, he was not there.

Mr. FRANK.—We will see whether he was, or not.

A. I saw the amount of damage to the stem.

Q. And you saw the position of it, and everything, didn't you, and from that you could draw your conclusion that she received a very severe blow?

A. Yes, and on that the recommendations of repair of the damage were based.

Q. In your opinion, of course, a vessel receiving a blow of that nature, with engines of the kind that she had, and the connections, she might be expected to receive a shock that would render an examination necessary to ascertain whether or not the [209] alignment or some other element in the engine-room had not been affected.

A. We did not consider it so, at least I didn't.

Q. The others did, didn't they, and they told you so?

A. The owners made the claim that such might be the case.

Q. That such might have been the case, and for that reason they wanted to overhaul the engines in order to feel that the vessel was seaworthy to go out; isn't that right?

A. I don't know what prompt*ly* them to do that, to overhaul the engines, but we did not consider it necessary on account of this damage, on account of the blow that she was struck.

(Deposition of Joseph Blackett.)

Q. But they did? A. They overhauled them.

Q. Didn't they state their reason for it at the time?

A. They stated that possibly some derangement had been caused by the collision.

Q. And that they deemed it necessary to overhaul them for that purpose and for that reason?

A. That is the plea they put forward.

Q. Overtime, or working overtime on a repair job, is a matter of special arrangement, is it not?

A. Usually all parties connected with the case and representing the various interests are consulted in the matter.

Q. Without an agreement that overtime shall be used, you would not consider that anybody was warranted in using overtime, would you?

Mr. GRIFFITHS.—What do you mean? I don't understand the question.

Mr. FRANK.—Q. I mean that straight time is the ordinary method of repair work, and without some direction or request with regard to overtime, you would not consider that overtime was proper?

A. For instance, if I were representing the underwriters direct on a case, not watching a case on behalf of them but actually handling a case for them, I would suggest overtime.

Q. If you did not suggest it, and overtime was worked, then representing the underwriters, you would in the end object to [210] it?

A. No, not necessarily. The underwriters only pay straight time.

(Deposition of Joseph Blackett.)

Q. They only pay straight time?

A. They only pay straight time.

Q. And you understand this really to be a defense for an underwriter's job. I will put it this way: That this was an underwriter's job.

A. I was there watching the case, I don't know who was liable or anything.

Mr. GRIFFITHS.—That is immaterial as between you and us, Mr. Frank, and I object to the question.

Mr. FRANK.—What is that?

Mr. GRIFFITHS.—As to whether he understood it to be an underwriter's job, or not. You are talking about your claim against the San Francisco & Portland Steamship Company now.

Mr. FRANK.—I understand that, but in order to get at the true facts of this matter, the defense is a defense by the underwriters.

Mr. GRIFFITHS.—That is absolutely immaterial.

Mr. FRANK.—It would be immaterial except for the testimony of this witness and the facts of this case; in other words, I am very frank to say—

Mr. GRIFFITHS.—The underwriters cannot defend on the ground that you employ overtime; your claim is against the San Francisco & Portland Steamship Company.

Mr. FRANK.—True, it is, but if I had taken overtime without an agreement to that effect—and this is my position—the underwriters, and therefore, the San Francisco & Portland Steamship

(Deposition of Joseph Blackett.)

Company, who are only standing between us and the underwriters, would have objected to it if they had found it to their interest to do so.

Mr. GRIFFITHS.—They certainly would not have objected to it if you had a heavy demurrage claim.

Mr. FRANK.—Well, that is all right, that is an admission; that is, if it paid them to object to it they would have objected to it, and if it did not pay them they would not have objected.

Mr. GRIFFITHS.—Nothing of the kind.

Mr. FRANK.—That is my position.

Q. You are Lloyd's agent, are you not?

A. Lloyd's surveyor, [211] surveyor to Lloyd's Register.

Q. And that is an underwriter's organization, is it not? A. It is a classification organization.

Q. Did you have anything to do with the drydocking of the vessel? A. In which way?

Q. You ordered her placed in the drydock, did you?

A. Recommendations were made for drydocking, yes.

Q. Did you make the suggestion that she should work overtime in the drydock?

A. No, I made no suggestion whatever in regard to anything except the repairs of the vessel.

Q. Do you know why she worked overtime in the drydock? A. I presume to save drydocking.

Q. Well, you don't know? A. I don't know.

(Deposition of Joseph Blackett.)

Q. And you say you made no suggestions regarding the time that she be there?

A. No; my duties were to survey the damage and make recommendations on the repairs and to see that there was nothing else done in these repairs other than the actual damage work.

Q. That is your construction of what your duties were; you received no instructions to that effect, did you?

A. In the dozens of cases we have handled of a similar nature, we assume that in this case that was so.

Q. You received no special instructions?

A. No special instructions, except to act without prejudice.

Q. And you were there regularly, watching the repairs as they were going along, and Captain Brym, as the surveyor representing the libelant, and you and Mr. Evers representing the respondent, consulted as between one another at the time, did you not?

A. We watched the case as the repairs were being carried out and discussed it in various ways.

Q. And your directions were full, were they not?

Mr. GRIFFITHS.—What directions do you mean?

Mr. FRANK.—Any directions that were made in the matter.

A. The directions that were made were laid out in the list of work which was carried out. [212]

(Deposition of Joseph Blackett.)

Q. And in the performance of the work you watched it to see that it was carried out in accordance of your understanding of what was desired?

A. Yes.

Q. And consulted with these people during the time to see that it was, did you not?

A. I cannot get quite your "consulting," Mr. Frank.

Q. Well, you were there and talked it over every day, whether it was being done in the right way, or the wrong way, and things of that sort?

A. Yes, it was carried out as per instructions in the first place. I don't know whether there was any discussion about anything, or not; I don't know whether any discussion about anything else came up, except possibly with regard to one or two plates.

Q. But, whatever it was.

A. Yes, whatever it was, I suppose so.

Q. If it was one or two plates, whatever it was, you directed it? A. Yes, that is the idea.

Q. And your ideas were fully carried out?

A. Yes, absolutely.

Redirect Examination.

Mr. GRIFFITHS.—Q. In brief, you were there to see that the repairs required by the collision were done, and nothing else: Is that it?

A. Yes, that is it.

Mr. FRANK.—I object to that on the ground that that is a mere conclusion. His authority has

(Deposition of Joseph Blackett.)

already been shown. The contract, between us determines the matter.

Mr. GRIFFITHS.—Yes, except that you have asked all these general questions about consulting and directing, without specifying the line you had in mind about the consultation; I do not want anything to come in by implication that is not in by clear questions.

Q. Was there any effort, so far as you could discern, to expedite this work on the part of the owners or their representatives there, to hurry it along?

A. I did not notice any. [213]

Q. Was the "Beaver" being repaired after the collision, also?

A. She was repaired after the collision, yes.

Q. Do you happen to know whether overtime was used in connection with her repairs?

A. Overtime was worked, yes.

Mr. FRANK.—I object to that; it is utterly immaterial whether there was, or not.

Mr. GRIFFITHS.—It shows that where a vessel is urgently needed they use overtime.

Mr. FRANK.—It doesn't show anything of the kind; it simply shows an arrangement made with reference to a particular case.

Mr. GRIFFITHS.—Q. As I understand it, Mr. Blackett, where you work what you call the double shift, you do not get this reduction in efficiency to which Mr. Frank referred—to the same extent, at any rate?

(Deposition of Joseph Blackett.)

A. Not to the same extent; you do not get the amount of work at night-time that you do in the day.

Q. Now, theoretically, with the double shift, you should save half the time.

A. You should save half the time.

Q. And when you state one-third, you state it that way because you are making a conservative and safe estimate: Is that correct?

A. That is absolutely correct.

Q. And the chances are you would save more than one-third?

A. It is possible you would save more; it all depends on how the people work.

Mr. FRANK.—Q. It is possible you would save less?

A. I do not think so; the men come in fresh; they are not tired; but being at night, it is possible a little soldiering might occur because the men are not in view all the time.

Mr. GRIFFITHS.—Q. You have been asked, in giving your opinion as to what time would be saved, to put it on an absolutely safe and conservative basis, have you not?

A. You say I have been asked?

Q. Yes; when I asked you how much time could be saved, I told you, did I not, that I wanted an absolutely conservative estimate, [214] with no stretching? A. Yes, you did.

Mr. FRANK.—That is immaterial, what you told him; we are after the fact.

(Deposition of Joseph Blackett.)

Mr. GRIFFITHS.—Q. What is your opinion as to the overhauling of those engines, as to whether there was any need of it on account of the collision?

A. If we had any idea that it was necessary on account of the collision, we would have made the recommendation for it.

Recross-examination.

Mr. FRANK.—Q. You say there was no effort made to expedite; there was no delay, was there, it was done diligently, wasn't it?

A. The work went along—in my opinion it could have been done quicker.

Q. You mean the day work?

A. By working this overtime.

Q. But the work that was done was done diligently and up to the capacity of the contractor at that time? We had no control over it, in other words. A. No.

Mr. GRIFFITHS.—There was no contractor, was there?

Mr. FRANK.—It was a time and material job.

Q. The libelant had no control over that?

A. No. The thing went along in the ordinary day's work.

Mr. GRIFFITHS.—Q. Any effort made to hurry them up at all as the work went along, that you observed?

A. Well, if there had been any effort made I guess overtime would have been worked.

Deposition of Frank H. Evers, for Claimant.

FRANK H. EVERS, called for the claimant, sworn.

Mr. GRIFFITHS.—Q. Mr. Evers, will you tell us what your address is, your business address?

A. The Fife Building, San Francisco.

Q. What is your business?

A. Marine surveyor.

Q. Have you any connection with the American Bureau of Shipping? A. Yes. [215]

Q. What connection?

A. The agent and surveyor for them.

Q. How long have you been a marine surveyor? I guess Mr. Frank won't object to your qualifications.

Mr. FRANK.—No, I will not object.

Mr. GRIFFITHS.—It is stipulated, then, that he is qualified.

Q. Did you have any relation to the repair work on the steamer or motor ship "Bayard," after her collision with the "Beaver," in the latter part of last August?

A. Yes, I was one of the surveyors on the job.

Q. Were you there during the repairs?

A. Yes.

Q. In what capacity were you there?

A. I was there representing the Portland Steamship Company.

Q. The San Francisco & Portland Steamship Company, the owners of the "Beaver"?

(Deposition of Frank H. Evers.)

A. Yes, the owners of the "Beaver."

Q. Were you there a great deal of the time during the repairs?

A. I think excepting Sunday I was there daily.

Q. Was there any overtime worked during those repairs? A. Yes, on the drydock.

Q. How much would that be, how many days was she on the drydock?

A. To the best of my knowledge there were two nights they worked on the drydock.

Q. Was any overtime worked during the other repairs? A. Not to my knowledge.

Q. Will you give us your opinion as to the time which could have been saved by the employment of double shift on that labor job?

A. Speaking conservatively, about one-third of the time.

Q. And how much would that have increased the expense per day?

A. You see, you work an eight shift and it would increase it just one day's pay each night; that would be the bonus time, one day's pay.

Q. Was any work done upon the "Bayard" other than that necessitated by the collision, other than that required on account of the collision.

A. They did a lot of work on the engines, of course. [216]

Q. What work did they do on the engines?

A. They gave them an overhauling.

Q. Was that overhauling required by the collision?

(Deposition of Frank H. Evers.)

A. We recommended nothing because of the collision on the engines.

Q. Did you see what the condition of the engines was as they were overhauled?

A. I saw a lot of it come out.

Q. What was the condition?

A. Very dirty, indeed, needed overhauling for dirt.

Q. Needed overhauling for dirt?

A. Yes, an accumulation of dirt.

Q. I suppose the engines were in better shape in that respect after the overhauling than they were before?

A. Well I didn't see them run afterwards.

Q. You didn't see them run afterwards?

A. No.

Q. Was any trial trip of this ship required because of the collision, after her repairs?

A. None that I know of.

Q. Were you attendant upon the repairing of the "Beaver" also at this time?

A. Every day on the "Beaver."

Q. Was overtime used on the "Beaver"?

Mr. FRANK.—That is immaterial and we object to it.

A. We worked night and day on the "Beaver" whenever it was necessary and after we were all consulted to do so.

Mr. GRIFFITHS.—Q. You were classifying the "Beaver"?

(Deposition of Frank H. Evers.)

A. The "Beaver" is classified in the American Bureau of shipping.

Q. Was any effort made, so far as you could discern, on the part of the owners or the representatives of the owners of the "Bayard" to speed up the repairs?

A. Well, they never asked to work overtime, if that is what you allude to; they never asked it.

Cross-examination.

Mr. FRANK.—Q. And you never suggested it?

A. No, sir, I never suggested it; I am not supposed to suggest it. [217]

Q. In the case of the "Beaver," you say you had consultations as to whether or not overtime should be used?

A. I wish to correct myself a little there; I consulted with the owners of the vessels and they said they wanted to work overtime on it; then I asked the Underwriters' surveyor, and he made me show him how I could save the time, and I showed him how by working overtime we could save the time, and then we went along with it so as to get the vessel out.

Q. So that without the consent of the Underwriters you would not have been able to use overtime on the "Beaver," either?

A. I would have done it if the owners would have insisted on it if they saw they could save money they would not have minded them; we do it in hundreds of cases.

(Deposition of Frank H. Evers.)

Q. That is, if the owners had insisted upon it you would have done it and the owners would have had to take their chances for the overtime?

A. Yes, and that would have been settled by the Average Adjusters at the finish up of the business; it would be my argument against his.

Q. In other words, they would take the chances of the Underwriters accepting it if it turned out to their advantage, but if it turned out to their disadvantage they would not accept it; is that right?

A. Yes, the underwriters would have objected to paying it.

Q. Because straight time is understood to be worked?

A. It is what the underwriters guarantee to pay.

Q. That is all?

A. Unless the saving can be shown by the working overtime, or for some other cause, or the owners say it is to their benefit and they can save money on freight or otherwise by getting the work done and putting the vessel into operaion.

Q. That simply amounts to the fact that there is a special arrangement between the parties; if the parties agree that they shall go on and do work on time and material basis, it is understood that it is straight time. [218]

Mr. GRIFFITHS.—I want that question to specify what you mean by parties, because these questions as between the insurers that you are referring to are all questions that do not concern anyone except the owners of the vessel and the insurers.

(Deposition of Frank H. Evers.)

Your duty is to minimize your loss. You are not dealing directly with the insurers at all.

Mr. FRANK.—I must insist, Mr. Griffiths, that I am entitled to that in this case because, as a matter of fact, in this settlement I am dealing with the insurers, they are making the defense.

Mr. GRIFFITHS.—That is immaterial and incompetent.

Mr. FRANK.—But it is a fact.

Mr. GRIFFITHS.—It is absolutely immaterial and incompetent; it is your duty to minimize your loss.

Mr. FRANK.—They are the ones who are making the objection about overtime, and not the owners.

Mr. GRIFFITHS.—I am attorney for the owners absolutely, now.

Mr. FRANK.—I understand that, but I want to get the matter straight in the record. The Underwriters are making a defense in the name of the owners.

Mr. GRIFFITHS.—They are not doing anything of the kind just now. It is the duty of the insurers and the owners to go ahead and settle the case and then consult with the Underwriters. That is not a matter that you are entitled to inquire into in this case.

Mr. FRANK.—Yes, it is, under the circumstances of the case, and that is the reason I am insisting upon it. Will you answer the question, Mr. Evers?

(Question read by the reporter.)

(Deposition of Frank H. Evers.)

A. Unless the owners want to work overtime.

Q. If they have such an agreement—unless they have a special agreement to work overtime it would be straight time, would it not?

A. Yes, unless the owners insist upon working on their own and paying for the extra themselves. [219]

Q. And paying the extra themselves?

A. Sure.

Mr. GRIFFITHS.—Q. And by arrangement between the parties, you mean between the insurers and the owners, and when you say, unless they have an agreement, you mean between the owners and the insurers?

A. I mean that the owners can take their own initiative and work it if they want to.

Q. And take their chances on getting it paid?

A. Well, if they find out they will make money by it they will pay for it.

Mr. FRANK.—Q. If any two parties agree that it shall be done on time and material basis at going rates, it is understood by that agreement that it is straight time; if one man agrees to pay for certain repairs to be done on time and material basis at going rates, it is understood, unless there is some special arrangement, that that is straight time?

A. That is true.

Redirect Examination.

Mr. GRIFFITHS.—Q. There are going rates for regular time and going rates for overtime, aren't there?

(Deposition of Frank H. Evers.)

A. Yes, it is single time for day time and double time for night time.

Q. So that going rates do not necessarily mean straight time or overtime, they may mean either, the going rates for over time or going rates for regular time.

A. It is understood you pay a man so much a day and if he works overtime you pay him double time; that is understood at all times.

Q. And those are the going rates either way.

Mr. FRANK.—You need not argue it with your witness.

A. Well, they are the understood rates.

Recross-examination.

Mr. FRANK.—Q. Unless something is said about overtime, it means straight time, doesn't it?

A. Unless the yard is instructed to work overtime they do not work; they work just the straight time.

Q. And if I make an agreement with you that I am going to make the repairs—and I am not the Yard—you and I have a controversy [220] as to which one will pay for it and I make an agreement with you, in which you agree to pay for the repairs, if I have it done on time and material basis at going rates, you understand that that is straight time, do you not?

A. I understand that that is straight time.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel, on Thursday, December 19, 1918, before me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the office of Nathan H. Frank, Esq., in the Merchants Exchange Building, in the city and county of San Francisco, State of California, personally appeared Joseph Blackett and Frank H. Evers, witnesses called on behalf of the Claimant in the cause entitled in the caption hereof; and Nathan H. Frank, Esq. appeared as proctor for the libelant, and F. P. Griffiths, Esq. appeared as proctor for the claimant, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by their depositions hereto annexed.

I further certify that the depositions were then and there taken down in shorthand notes by Charles R. Gagan, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the depositions to the witnesses and the signing thereof were expressly waived. [221] And I do further certify that I have retained the said depositions in my possession for the purpose of delivering the same with my own hands to the Clerk of the United States District Court for the Northern

District of California, the court for which the same were taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 4th day of Febry. 1919.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Feb. 4, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [222]

[Title of Court and Cause.]

No. 16303.

(Deposition of L. K. Silversen, for Libelant.)

BE IT REMEMBERED: That on Thursday, December 19, 1918, pursuant to stipulation of counsel hereunto annexed, at the office of Nathan H. Frank Esq., in the Merchants Exchange Building, in the city and county of San Francisco, state of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, authorized to take acknowledgments of bail and affidavits, etc., L. K. Silversen, a witness called on behalf of the libelant.

Nathan H. Frank, Esq., appeared as proctor for the libelant, and F. P. Griffiths, Esq., appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the libelant at the offices of Nathan H. Frank, Esq., in the Merchants Exchange Building, in the city and county of San Francisco, state [223] of California, on Thursday, December 19, 1918, before Francis Krull, a United States Commissioner for the Northern District of California and in shorthand by Charles R. Gagan.

(It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived.) [224]

(Deposition of L. K. Silversen.)

L. K. SILVERSEN, called for the libelant, sworn.

Mr. FRANK.—Q. Mr. Silversen, what is your business?

A. Sales Manager for the Bethlehem Shipbuilding Corporation.

Q. That is the Union Iron Works, is it not?

A. Yes.

Q. At the time that the "Bayard" was being repaired down there, what was your business?

A. I was soliciting repair work and receiving the instructions or directions from the man that had the repair work done, as well as in a general way keeping in touch with the work while the work was being carried out; in short, to see that the customer was satisfied.

Q. In other words, you were representing, in the matter of this repair, the Union Iron Works?

A. Yes, sir.

Q. And in that respect you were down there watching the repairs and seeing that they were done as it was agreed between the parties?

A. Not continually, I was from time to time.

Q. Well, you were supervising and you superintended?

A. I should not say that I was supervising or superintending the repairs personally; I had other people doing that in the different departments; I would go down and talk to those people, from time to time.

(Deposition of L. K. Silversen.)

Q. In other words, you are the head man, you were the head supervisor—

Mr. GRIFFITHS.—I object to leading the witness; let us get from him what the situation was.

Mr. FRANK.—I don't want to lead him. It is only a matter of saving time, it is simply to place the witness in his position; that is all. I am perfectly satisfied in his answer, we will not get into any controversy about it.

Q. In that connection you were of course familiar with the conditions at the yards, the work to be done and— [225]

Mr. GRIFFITHS.—I object to that as leading, ask him if he was familiar with it.

Mr. FRANK.—Q. Were you familiar with the condition of the yard, the work to be done, the men available, and things of that sort? A. Yes.

Q. What, if anything, can you say concerning the conditions down there—

A. Excuse me a minute, can I explain to you more thoroughly what my position was?

Q. Surely, explain the whole thing.

Q. The yard is equipped with a man who is superintendent of the yard; there are again superintendents of the different departments; there is a superintendent of the machine ship, there is a superintendent of the hull department, who looks after all the hull repairs; I consult with all those superintendents; I would receive the instructions from a man who was having the work done in place of having him go to all the different foremen or

(Deposition of L. K. Silversen.)

superintendents throughout the yard, he prefers to deal with one man and he deals with me, and then I issue the instructions to the rest of the men around the yard.

Q. And you see that they are carried out?

A. Not always, many times if the work is not carried out in accordance with instructions, some representative of the owners may see it before I know of it and they will come and complain to me about it, and then I will go to the superintendent of that department and then I will go down and look at it myself to ascertain if it is really so.

Q. What, if anything, can you say concerning the conditions at the yard with respect to men available for this work, for an extra shift at night time?

A. I know that we were very busy at the time, and we had not sufficient men for a double shift, in the first place; in the second place, it is very difficult to get [226] the men to work a double shift on a straight eight-hour basis; in cases where you can get the men to work a double shift, they insist upon working eleven hours.

Q. At any rate, you did not have the men available, I understand, for a double shift? A. No.

Q. In an ordinary agreement for repairs on a time and material basis, where nothing is said about working overtime, state whether or not that includes overtime, or whether it means straight time, according to the understanding in the business, and without special instructions to work overtime?

(Deposition of L. K. Silversen.)

A. We never work overtime, unless we are specially directed to do so.

Q. In case of contract or an agreement to work on a time and material basis, and nothing said about overtime, what would you understand that to mean between the parties?

A. I would understand that to mean we would not work any overtime unless we were directed to do so.

Q. Where men work overtime on a single shift, state whether or not that doubles or trebles the wage expense?

A. I think it would more nearly treble it.

Mr. GRIFFITHS.—Q. More nearly treble it, you say?

A. Yes; if I say positively that it would treble it, you would then ask me to show you why, and I have not any definite figures to prove it would treble it, except from my general knowledge of the business.

Q. Where a man works, say, eight hours, and then works overtime, what wage does he get for the overtime?

A. He gets double the amount of his pay during the day time, during the first eight hours.

Q. And what about his efficiency?

A. It is reduced considerably. [227]

Cross-examination.

Mr. GRIFFITHS.—Q. Was the "Beaver" repaired at the Union Iron Works? A. Yes, sir.

Q. And they worked overtime on her, did they not? A. Yes.

(Deposition of L. K. Silversen.)

Q. Why was that, do you know?

A. We received instructions from the owners to work overtime.

Q. They said they wanted it?

A. They said the ship had to sail on a certain date, on a trip to Portland, and in order to finish the ship so that she could go to sea on that date and to complete all the repairs, it was absolutely necessary to work overtime.

Q. What did you use? Did you use a double shift there, do you recall?

A. I don't recall exactly, but I think it was all straight work; by that I mean the men worked straight through as long as they could.

Q. Where they worked straight through as long as they could, you say their efficiency was reduced?

A. Yes.

Q. But still you save time, don't you?

A. Oh, yes.

Q. There is no question about that, at all?

A. Oh, no.

Q. How much do you think you save, do you cut off as much as one-third?

A. Oh, yes, it would cut that off all right.

Q. It would cut off one-third easily, even if it worked straight through?

A. Yes, if you work men until, say, about half past eleven every night. In a case like the "Beaver," where they were in a hurry to get the vessel out, it is possible sometimes to arrange that one certain set of men, say, for instance, men cutting

(Deposition of L. K. Silversen.)

out rivets, could work until twelve or one o'clock in the morning and thereby get done a lot of work that can be done the next day for another set of men, for another shift of men.

Q. All I want is simply to get from you what the actual situation is. Now, as I understand it, it is this: If a man really wants [228] a vessel, badly, if she is valuable, you can arrange to give him overtime, can't you, either by straight-through time, or by double shifts, if it really is an urgent case?

A. Usually, yes.

Q. Did the owners, or the owners' representatives, ever suggest to you during the repairs on the "Bayard" that there was any hurry to get the "Bayard" out?

A. They wanted to get the "Bayard" out as quick as they could.

Q. Did they say that?

A. I think they made the request that they wanted to get the "Bayard" to sea not later than the 6th of December, as far as I can remember, but we were not able to do it.

Q. They did not request you to use any overtime, did they? A. No, sir.

Q. Where there is an agreement between parties to repair a vessel on the basis of time and materials at going rates, that does not prevent you from using overtime if the parties want the overtime, does it?

A. No, it does not prevent us from using overtime, but we have to receive special instructions to

(Deposition of L. K. Silversen.)

work overtime. But we have to receive special instructions to work overtime.

Q. And when you receive the special instructions under those circumstances, the going rates would mean the going rates if they used overtime, would it not?

A. That is what it would mean, yes.

Redirect Examination.

Mr. FRANK.—Q. They were proceeding with all the diligence they could, were they not? A. Yes.

Q. Except that they did not use overtime?

A. They did not use overtime.

Q. You say you can usually arrange to give men for overtime, but in this particular case you said you could not do it? [229]

A. We were not asked to do it.

Q. You said you could not put on two shifts?

A. We could not put on two shifts if they had wanted it.

A. And as I understand it, they told you they were anxious to get the ship not later than December 6th, and you were unable to get it to them even by that time?

A. I should probably not be so positive regarding the date, but I know that it was more than a week sooner than the vessel was delivered; we tried all we could to do it, but we were not able to make it.

Q. In other words, they were anxious to get the vessel as soon as they could? A. Yes, sir.

Cross-examination.

Mr. GRIFFITHS.—Q. Who told you they were

(Deposition of L. K. Silversen.)

anxious to get her out in a hurry, who actually told you that? A. Captain Brym.

Q. They overhauled the engines on the "Bayard" while she was there didn't they? A. Yes.

Q. And there was some miscellaneous work done for the owner's account, was there not? A. Yes.

Q. Do you recall how much that other work amounted to?

A. In which way, in money?

Q. What was the other work? Tell us what was done with respect to overhauling the engines?

A. They opened up all the cylinders for examination and they fitted on new piston rings; I think they refitted the cross-head brasses, just took them down and looked them all over; the crank pin brasses, as well, were also taken down and examined; the auxiliary engines had new foundations installed under them.

Q. Anything else?

A. There were a number of minor jobs; those were the principal things.

Q. Were the engines cleaned up thoroughly?

A. Naturally, in a [230] case like that, where there is so much work done, there is a great deal of dirt generated, and that naturally had to be cleaned up.

Q. They naturally took advantage of the chance to clean the engines out and put them in good order; is that a fair statement?

A. What do you mean, the interior portion, or the exterior portion, of the engine-room, or what?

(Deposition of L. K. Silversen.)

Q. Both.

A. The exterior of the engine-room, down around the engines, was cleaned up.

Q. How about the engine-room?

A. Naturally, when you remove a piston for examination there is always more or less dirt that has to be cleaned up.

Q. Aside from the engines, was there any work done on the vessel for the owner's account?

A. I spoke of the auxiliary engines.

Q. You said you put new foundations under those.

A. There was miscellaneous pipe work and things of that nature; I don't remember exactly.

Q. That is to say, work altogether apart from the work required on account of the collision; there is no question about that at all, is there?

A. Work that was charged to the owner's account.

Q. Can you tell approximately what the amount of that additional work would be in term of money, say?

Mr. FRANK.—We object to that, because we are not making any claims for that in the damages.

Mr. GRIFFITHS.—It is material in another connection.

Mr. FRANK.—In what connection?

Mr. GRIFFITHS.—Q. Can you answer that question?

Mr. FRANK.—I would like to know the materiality of it.

(Deposition of L. K. Silversen.)

A. I don't remember what it amounted to in money.

Mr. GRIFFITHS.—Q. Not even in round figures?

A. No, I don't remember exactly. The owner's bill was around $20,000, [231] but I might be mistaken about that.

Q. You think it was about $20,000?

A. Something like that.

Redirect Examination.

Mr. FRANK.—Q. That work did not interfere with the work that was being done under the recommendations of those surveyors, did it?

A. No, sir.

Q. Was not the most of it being done by their own men aboard the vessel, their own engineers and crew?

A. Their own engineers and crew were working all the time, but I don't know that I should say that the most of it was done by them; I don't think I could say the most of it was done by them.

Q. Well, was half of it done by them? Was a very material part of it done by them?

A. A material part was done by them; for the overhauling of the engines they got a certain number of men from us, I think four or six men, that worked according to the engineer's instructions on the engines, and we kept no special account of what those men were doing, they did whatever the engineer told them to do. Those men worked together

(Deposition of L. K. Silversen.)

with the engineers on the ship, assisted them in doing whatever they were doing.

Q. That was the extent of the man power that was given by you? A. To the engineers, yes.

Q. And the rest was material: Is that right?

A. Oh, no; in connection with the new foundations under the auxiliary motors there was a considerable amount of labor used; it was outside of anything that was done on the engine.

Q. The auxiliary motors were entirely separate and apart, that had nothing to do with the main engines at all?

A. No, nothing to do with the main engines.

Q. That was a side job?

A. That was aside from the main engines, yes. [232]

Q. Did they do anything with reference to examining the shafts for their alignment?

A. My recollection at the present time is that the survey, or the recommendation of the surveyor called for an exterior examination of the engine and its foundations, as well as the alignment of the shaft, and that was done.

Q. And that was done because of the likelihood of injury due to the shock from the collision, wasn't it?

A. I think that is the reason that they put forth for it, yes.

Mr. GRIFFITHS.—Q. Whom do you mean by "they"?

(Deposition of L. K. Silversen.)

A. The surveyors. The surveyers collectively wrote up a specification or work list that we were to carry out, and we carried out the work that was enumerated on that work list.

Mr. GRIFFITHS.—Have you that work list, Mr. Frank?

Mr. FRANK.—I must have it.

Mr. GRIFFITHS.—Don't you think it would be a good idea to put that in so there will be no question about what was called for?

Mr. FRANK.—I don't think there is any question about it, but I have no objection to your having the work list. I will provide it to you later.

Mr. GRIFFITHS.—And it is stipulated that after you give it to me, it may go in?

Mr. FRANK.—Subject to my objection as to its materiality.

Mr. GRIFFITHS.—Surely. There have been several questions asked him about the specifications.

Mr. FRANK.—Q. And also shock of that sort will be likely to disarrange or injure the pipes and things of that sort, would it not?

A. Mr. Frank, I don't like to answer that question; I am not classed as an expert that is supposed to give testimony regarding these things. [233]

Q. I simply want to know from your own experience; if you have not any experience that warrant it you can say so; if you have experience that warrant it, I want to know what your experience is about those things. I will change the question.

(Deposition of L. K. Silversen.)

however. After a collision of that kind and you know from the damage what the nature of the collision was, would you consider it a prudent thing on the part of a ship owner to take his ship out without satisfying himself that the engines and connections have not been injured by the shock?

A. No, I think the owner is justified in making all possible examination to see that nothing has happened, because once he goes to sea things might give out that they do not anticipate, and he might have considerable trouble.

Recross-examination.

Mr. GRIFFITHS.—Q. You would, however, on a question like that, as I understand you, defer to the judgment of the surveyor rather than to your own judgment, would you not? Do you understand what I mean? A. We take orders.

Q. You take orders? A. We take orders.

Q. And on a question of whether such and such an examination of the engines was needed you would be guided rather by the judgment of the surveyors than by your own personal judgment, as I understand it?

A. It is entirely up to the surveyors; if the surveyors recommend that the engine be examined, we examine it; whether we think it is necessary or that it is not necessary is immaterial, we do as the surveyor tells us to do. We venture no opinion except when we are asked.

Mr. FRANK.—Q. That is, you are speaking of

(Deposition of L. K. Silversen.)

the Union Iron Works, now, and not the owner?

A. I am speaking of the Union Iron Works.

Mr. GRIFFITH.—He has to speak of the Union Iron Works. [234]

The WITNESS.—I have no connection with the owners.

Mr. FRANK.—Therefore your question is immaterial.

Mr. GRIFFITHS.—I am asking him simply if he would defer to the judgment of the surveyors rather than take his personal judgment.

The WITNESS.—I understood Mr. Frank to ask me my personal opinion. That is why I answered; otherwise I should not have answered.

Mr. FRANK.—Q. And in this other case you are speaking entirely of what the Union Iron Works would do in making the repairs? A. Yes.

Mr. GRIFFITHS.—*A*. Now, I say that as to your personal opinion, you told Mr. Frank a little while ago that you would not care to answer a question as to whether such and such work could be done upon the ground that that was not a matter upon which you pretended to be a specialist; now I say to you that, as between your personal opinion and the opinion of the surveyors, you would prefer the opinion of the surveyors on a point like that: Isn't that so?

Mr. FRANK.—It is utterly immaterial what he prefers; we have a right to our own judgment.

A. In my experience in making repairs to steam-

(Deposition of L. K. Silversen.)

ers, on the machinery as well as to the hull, I have seldom found that the opinion of the surveyor was any different from my own.

Mr. GRIFFITHS.—Q. You usually agree with the surveyor? A. Yes.

Mr. GRIFFITHS.—That is all. I would like to have those specifications. [235]

Further Redirect Examination.

Mr. FRANK.—Q. You say you seldom found it, but there are cases where you consider your own opinion preferable to that of the surveyor?

A. Well, it is usually the same.

Q. Usually, yes, but there are cases in which you do not consider it proper, in your opinion, to defer to the surveyors?

A. In that case I don't voice them.

Q. Counsel is trying to get you to say—

Mr. GRIFFITHS.—I object to any suggestion as to what I am trying to get him to say; I am asking him what the situation is. It is perfectly clear what he thinks about this.

Mr. FRANK.—I want the witness to understand the question, and I want to get a fair reply covering the fact.

Mr. GRIFFITHS.—Yes, we want what he thinks.

Mr. FRANK.—In other words, there are occasions that while you literally agree with the surveyors, there are occasions when you do not agree with them. That is the question.

A. Is this directed to me personally, or as a

(Deposition of L. K. Silversen.)

representative of the Union Iron Works?

Q. To you personally. A. Yes.

Mr. GRIFFITHS.—Q. Did you have any difference with the surveyors on this job at all?

A. No, sir.

Mr. FRANK.—Q. You were not called upon; you were acting in this instance as a representative of the Union Iron Works and taking orders: Is that right? A. That is right.

Mr. GRIFFITHS.—Now, let us get the matter of the specifications cleared up; you have those, have you?

Mr. FRANK.—I will get them, Mr. Griffiths. I don't seem to find them here now.

Mr. GRIFFITHS.—At any rate, it is stipulated that the specifications may go in, when you find them. [236]

Mr. FRANK.—I will stipulate that you can offer the specifications and that I object to their introduction as immaterial. I will give them to you. With that stipulation they can be attached to the deposition.

Mr. GRIFFITHS.—And if we offer them they can be marked claimant's exhibit, whatever the name is. [237]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that, in pursuance of stipulation of counsel, on Thursday, December 19, 1918, before

me, Francis Krull, a United States Commissioner for the Northern District of California, at San Francisco, at the offices of Nathan H. Frank, Esq., in the Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared L. K. Silversen, a witness called on behalf of the Libelant in the cause entitled in the caption hereof; and Nathan H. Frank, Esq., appeared as proctor for the Libelant, and F. P. Griffiths, Esq., appeared as proctor for the Respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by Charles R. Gagan, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof were expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hands to the Clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named nor in any way interested

in the event of the cause named in the said caption. [238]

IN WITNESS WHEREOF, I have hereunto set my hand in my office aforesaid this 4th day of Febry., 1919.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Feb. 4, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [239]

[Title of Court and Cause.]

No. 16303.

(Opinion and Order to Enter Decree in Favor of Libelant, etc.)

NATHAN H. FRANK, Esq., and IRVING H. FRANK, Esq., Proctors for Libelant.

FARNHAM P. GRIFFITHS, Esq., and McCUTCHEN, WILLARD, MANNON & GREENE, Proctors for Respondent and Claimant.

The "Bayard" and the "Beaver" collided in the harbor of San Francisco on November 3d, 1917. The Respondent "Beaver" admits liability for the collision and the only question left for determination is the question of damages. The cost of repairs to the "Bayard" must, of course, be allowed. The fact that other repairs, not necessitated by the

collision, were made, but which did not delay the completion of the repairs so necessitated is, as I view the case, immaterial. The period covered by the making of the repairs was forty-eight days. It would, however, in any event have taken at least two weeks to have arranged for the acceptance [240] by the owners, of a charter satisfactory to the Shipping Board. The "Brazil," a ship of the same general type as the "Bayard," entered San Francisco harbor on November 13th, 1917, ten days after the collision, and remained there idle until the middle of January, 1918. During all of this time Olson & Co., of Norway, were the managing owners of both the "Bayard" and the "Brazil." Moore & Co. had offered a lump sum of $400,000.00 as charter hire for the "Bayard" for a voyage to the Orient and return, and it is on this offer that libelant bases its claim for the amount of damages sought as demurrage. But it is quite clear that a charter at that rate would not have been approved by the Shipping Board, which had fixed a basic rate of forty-five shillings per deadweight ton per month. While the "Bayard" was laid up for repairs the "Brazil" was also idle in port, although there was a great demand for ships and she could have sailed at any time at the rates fixed by the Board. The fact that she did not do so leads me to the belief that the owners were unwilling to accept those rates, and preferred to wait in the hope or expectation of securing a more profitable figure. They were in fact unwilling to accede to the regu-

lations of the Shipping Board in regard to rates, and seemingly desired to take their chances of getting higher rates later by leaving the ship idle during this period. If it were not for the voluntary idleness of the "Brazil" I would allow demurrage to the "Bayard" at the rate of forty-five shillings per deadweight ton per month for the period of thirty-four days. But as the owners preferred to leave the "Brazil" idle when she could have been chartered at those rates, it is reasonable to conclude that they would not have accepted them for the "Bayard" had she been in commission. A higher rate would not have been approved by the Board. [241]

A decree will be entered in favor of libelant for the amount expended in making the repairs rendered necessary by the collision. If the parties do not agree as to this amount, the cause will be referred to the Commissioner to ascertain and report the same.

September 23d, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Sep. 23, 1921. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [242]

[Title of Court and Cause.]

No. 16303.

Interlocutory Decree.

This cause having been duly heard on the plead-

ings and proofs, and having been argued and submitted by the proctors for the respective parties, and respondent vessel "Beaver" and her claimant, San Francisco & Portland Steamship Company, having admitted liability for the collision and for the physical damages to the "Bayard" caused by the collision, and having contested libelant's claim for damages for demurrage, and due deliberation having been had and the Court having filed its opinion herein finding and holding that the libelant should recover the amount expended in making the repairs to the "Bayard" rendered necessary by the collision but no damages for demurrage for the reasons and in accordance with the findings set forth in said opinion, and having ordered that a decree be entered accordingly with reference to the United States Commissioner to ascertain [243] and report the said physical damages;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that libelant, Aktieselskapet Bonheur, a corporation, do have and recover from claimant, San Francisco & Portland Steamship Company, a corporation, the amount expended in making the repairs to the "Bayard" rendered necessary by the collision, but no damages for demurrage or detention.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cause be, and it is hereby, referred to United States Commissioner Francis Krull to ascertain and report the aforesaid physical damages.

Oct. 7th, 1921.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Oct. 7, 1921. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.

Entered in Vol. 11 Judg. and Decrees, at page 294. [244]

[Title of Court and Cause.]

No. 16303.

Stipulation Submitting to the Determination of the Court Certain Disputed Items of Damage.

The Court having under date October 7, 1921, made and entered the Interlocutory Decree herein as follows:

> "This cause having been duly heard on the pleadings and proofs, and having been argued and submitted by the proctors for the respective parties, and respondent vessel "Beaver" and her claimant, San Francisco & Portland Steamship Company, having admitted liability for the collision and for the physical damages to the "Bayard" caused by the collision, and having contested libelant's claim for damages for demurrage, and due deliberation having been had and the Court having filed its opinion herein finding and holding that the libelant should recover the amount expended in making the repairs to the "Bayard" rendered necessary by the collision but no damages for demurrage for

the reasons and in accordance with the findings set forth in said opinion, and having ordered that a decree be entered accordingly with reference to the United States Commissioner, to ascertain and report the said physical damages;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that libelant, Aktieselskapet Bonheur, a corporation, do have and recover from claimant, San Francisco & Portland Steamship Company, a corporation, the amount expended in making the repairs to [245] the "Bayard" rendered necessary by the collision, but no damages for demurrage or detention.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cause be, and it is hereby, referred to United States Commissioner Francis Krull to ascertain and report the aforesaid physical damages."

And said hearing having, in the absence from this jurisdiction of the said United States Commissioner Francis Krull, been noticed before United States Commissioner T. E. Hayden for the 19th day of December, 1921, and, with the consent of the parties, having been thereafter continued from time to time for the purpose of enabling the parties to arrive at an agreement, in whole or in part, as to the amount expended in making the repairs to the "Bayard" rendered necessary by the collision.

And the said libelant retaining and insisting upon its exception to so much of the said decree as disallows its said claim for demurrage but the parties

having now agreed, and they hereby do agree that said physical damages amount to at least $58,096.15;

And the libelant having claimed and claiming also and in addition to said $58,096.15, the following sums expended by it, namely:

For Watchman T. Pentland on the "Bayard" from November 3d to December 21, 1917; 49 days at $3.50 per day	$ 171.50
For Watchman Chas. Bergk on the "Bayard" from November 3d to December 21, 1917; 49 days at $3.50 per day	171.50
For 3 tons of coal for cooking while the "Bayard" was laid up for repairs at $15.25 per ton	45.75
For wages for 30 men (members of the crew of the "Bayard") during the period of repairs, November 3d to December 21, 1917; 49 days at $85.00 per day	4165.00

[246]

For vitualling of said 30 men during said period of repairs, from November 3d to December 21, 1917; 49 days at $30.00 per day	1470.00
Total	$6023.75

And claimant having disputed and disputing said last enumerated items and each of them; and the Interlocutory Decree making no provision respecting interest and costs;

NOW, THEREFORE, the hearing heretofore noticed before United States Commissioner Hayden and continued from time to time is, by consent of the parties and of the Court discontinued;

And the parties hereby submit to the Court the question which, if any of the aforesaid disputed items, shall be allowed in addition to the aforesaid sum of $58,096.15, upon which the parties have agreed and hereby do agree. The items of interest and costs are further hereby reserved for the determination of the Court upon the settlement of the final decree.

Dated: March 2, 1922.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelant.
FARNHAM P. GRIFFITH,
McCUTCHEN, OLNEY,
WILLARD, MANNON &
GREENE,
Proctors for Claimant.

[Endorsed]: Filed Mar. 3, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [247]

[Title of Court and Cause.]

No. 16303.

(Order Fixing Amount of Final Decree.)

NATHAN H FRANK, Esq., and IRVING H. FRANK, Esq., Proctors for Libelant.

FARNHAM & GRIFFITHS, Esq., and McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE, Proctors for Respondent and Claimant.

A final decree will be entered herein for libelant for the sum of $58,096.15, with interest from December 21st, 1917, at six (6%) per annum and costs of suit.

March 7th, 1922.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 7, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [248]

[Title of Court and Cause.]

No. 16303.

Final Decree.

This cause having come on regularly for trial, libelant appearing by Nathan H. Frank, Esq., and claimant and respondent appearing by Farnham P. Griffiths, Esq., and McCutchen, Olney, Willard, Mannon & Greene, and the Court having filed its opinion herein holding and deciding that libelant

should recover the amount expended by it in making repairs on the "Bayard" rendered necessary by the collision referred to in the libel on file herein, but no damages for demurrage for the reasons and in accordance with the findings set forth in said opinion;

And it further appearing that an interlocutory decree was duly and regularly made and entered herein, referring said cause to Francis Krull, United States Commissioner herein, to ascertain and report the amount of physical damage suffered by [249] libelant, and the parties hereto having waived said reference to said commissioner, and having filed a stipulation herein, agreeing that the physical damages to the "Bayard," caused by the collision referred to in said libel, is at least the sum of Fifty-eight Thousand, Ninty-six and 15/100 (58,096.15) Dollars, and libelant having claimed, in addition to said last-named sum, the sum of Six Thousand, Twenty-three and 75/100 (6,023.75) Dollars, on account of wages paid to the crew of said "Bayard" during the period of repairs to said vessel, and on account of other matters referred to in said stipulation, and the Court having filed its order herein fixing libelant's damage at the sum of Fifty-eight Thousand, Ninety-six and 15/100 (58,096.15) Dollars, and disallowing the said additional sum of Six Thousand, Twenty-three and 75/100 (6,023.75) Dollars, or any other sum;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the libelant herein Aktieselskapet Bonheur, a corpora-

tion, do have and recover from the respondent the American Steamer "Beaver," and the claimant San Francisco & Portland Steamship Company, a corporation, the sum of Fifty-eight Thousand and Ninety-six and 15/100 (58,096.15) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the 21st day of December, 1917, until paid, and costs to be hereafter taxed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that unless an appeal be taken from this decree within the time limited and prescribed by law and the rules and practices of this Court, that the stipulators for costs and value on the part of the claimant herein do cause the engagements of their stipulations to be performed, and that the claimant San Francisco & Portland Steamship Company, a corporation, do satisfy this decree, or show cause within four (4) days after the expiration of the said time to appeal, why execution should not issue against the goods, chattels, lands [250] and tenements or other real estate of the said stipulators and claimant, for the aforesaid sum of Fifty-eight Thousand and Ninety-six and 15/100 (58,096.15) Dollars, together with interest and costs to enforce the satisfaction of this decree.

Dated: This 11 day of March, 1922.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Receipt of a copy of the within decree is hereby admitted this 10th day of March, 1922.

McCUTCHEN, OLNEY, WILLARD,
MANNON & GREENE,
Proctors for Claimant.

Form O. K.

McCUTCHEN, OLNEY, WILLARD.
MANNON & GREENE.

Filed Mar. 11, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 12 Judg. and Decrees, at page 75. [251]

[Title of Court and Cause.]

No. 16303.

Notice of Appeal.

To San Francisco & Portland Steamship Company, Claimant herein, Messrs. McCutchen, Willard, Mannon & Greene, Proctors for said Claimant, and to the Clerk of the United States District Court for the Northern District of California, Southern Division:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that Aktieselskapet Bonheur, a corporation, libelant in the cause above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the District Court of the United States for the Northern District of California, made and en-

tered in said cause on the 11th day of March, 1922, and for the whole thereof.

Dated, at San Francisco, California, this 17th day of April, 1922.

NATHAN H. FRANK,
IRVING H. FRANK,
Libelant's Proctors.

[Endorsed]: Receipt of a copy of the within Notice of Appeal is hereby admitted this 17th day of April, 1922.

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Claimant.

Filed Apr. 17, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [252]

[Title of Court and Cause.]

No. 16,303.

Assignment of Erorrs.

Comes now Aktieselskapet Bonheur, a Corporation, libelant in the above-entitled cause, and assigns the following errors of the above-entitled Court in said cause:

I.

The Court erred in finding that the said libelant was not entitled to demurrage for the loss of time suffered by the motorship "Bayard" by reason of the collision in said libel set forth.

II.

The Court erred in not finding that the libelant was entitled to demurrage for the loss of time of the "Bayard" at the rate per day of what her earning would be under a charter for the payment of Four Hundred Thousand Dollars ($400,000) for a round trip from San Francisco to two points in the Philippines and return to San Francisco. [253]

III.

The Court erred in not finding that the said libelant was entitled to demurrage in the sum of at least Two Hundred Sixty-six Thousand Five Hundred Four 82/100 ($266,504.82) Dollars for loss of time of said "Bayard" due to the collision in said libel mentioned.

IV.

The Court erred in finding that the Shipping Board would not have approved a higher rate of freight on a charter of said vessel than forty-five shillings (45s.) per deadweight ton per month for the period of thirty-four (34) days.

V.

The Court erred in finding that the owner of the "Brazil" preferred to leave said vessel idle when she could have been chartered at those rates, to wit, forty-five shillings (45s.) per deadweight ton per month.

VI.

The Court erred in not finding that the claim of libelant for demurrage in the present case is not in anywise or at all affected by what the owners of the

"Brazil" did, or preferred to do, with said motorship "Brazil."

VII.

The Court erred in finding that the charter of said vessel at the rate of Four Hundred Thousand Dollars ($400,000) *Dollars* for a round trip would not have been approved by the Shipping Board.

VIII.

The Court erred in failing to allow the said libelant the sum of One Hundred and Seventy-one 50/100 Dollars (171.50) for Watchman T. Pentland on the "Bayard" from November 3 to December 21, 1917,—49 days at $3.50 per day. [254]

IX.

The Court erred in failing to allow the said libelant One Hundred Seventy-one 50/100 ($171.50) Dollars for Watchman Charles Bergk on the "Bayard" from November 3d to December 21, 1917,—49 days at $3.50 per day.

X.

The Court erred in failing to allow libelant Forty-five 75/100 (45.75) Dollars for three (3) tons of coal for cooking while the "Bayard" was laid up for repairs.

XI.

The Court erred in failing to allow the libelant Four Thousand One Hundred Sixty-five ($4,165.00) Dollars for wages of thirty (30) men, members of the crew of the "Bayard" during the period of repairs, November 3d to December 21, 1917,—49 days at $85 per day.

XII.

The Court erred in failing to allow libelant the sum of One Thousand Four Hundred and Seventy (1,470.00) Dollars for victualling of said thirty men during the said period of repairs from November 3d to December 21, 1917,—49 days at $30.00 per day.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelant and Appellant.

[Endorsed]: Receipt of a copy of the within Assignment of Errors is hereby admitted this 20th day of July, 1922.

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Respondent.

Filed Jul. 20, 1922. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [255]

[Title of Court and Cause.]

No. 16303.

Stipulation for Filing of Original Exhibits in Circuit Court of Appeals on Appeal Herein, and Order Thereon.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto, that the Exhibits introduced upon the trial of the above-entitled action may be transmitted to the Circuit Court of Appeals on appeal herein as original Exhibits.

Dated: July 21, 1922.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelant.

FARNHAM GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Respondent and Claimant.

So ordered: July 24th, 1922.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed July 24, 1922. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [256]

[Title of Court and Cause.]

No. 16303.

Order Extending Time to and Including June 17, 1922, to File Assignment of Errors and Docket Cause.

IT IS HEREBY ORDERED that Aktieselskapet Bonheur, a corporation, Libelant herein, have to and including the 17th day of June, 1922, within which to file its assignment of errors herein and to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the apostles on appeal in such cause certified by the Clerk of this Court.

Dated: May 17, 1922.

M. T. DOOLING,
Judge United States District Court.

[Endorsed]: Filed May 17, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [257]

[Title of Court and Cause.]

No. 16303.

Order Extending Time to and Including July 17, 1922, to File Assignment of Errors and Docket Cause.

IT IS HEREBY ORDERED that Aktieselskapet Bonheur, a corporation, libelant herein, have to and including the 17th day of July, 1922, within which to file its assignment of errors herein and to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the apostles on appeal in said cause certified by the Clerk of this Court.

Dated: June 17, 1922.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jun. 17, 1922. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [258]

[Title of Court and Cause.]

No. 16303.

Order Extending Time to and Including August 10, 1922, to File Assignment of Errors and Docket Cause.

IT IS HEREBY ORDERED that Aktieselskapet

Bonheur, a corporation, libelant herein, have to and including the 10th day of August, 1922, within which to file its assignment of errors herein and to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the apostles on appeal in said cause certified by the Clerk of this Court.

Dated: July 17, 1922.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jul. 17, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [259]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 259 pages, numbered from 1 to 259, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of Aktieselskapet Bonheur, a corporation, Libelant, vs. The American Steamer "Beaver," her tackle, etc., respondent No. 16303, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of which is embodied herein), and the instructions of the proctors for libelant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of one hundred and six dollars and forty-five cents ($106.45) and that the same has been paid to me by the proctor for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of August, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk.

[Endorsed]: No. 3906. United States Circuit Court of Appeals for the Ninth Circuit. Aktieselskapet Bonheur, a Corporation, Appellant, vs. San Francisco & Portland Steamship Company, a Corporation, Claimant of the American Steamer "Beaver," Her Tackle, Apparel, Engines, Boilers, Furniture, etc., Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 7, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

Libelant's Exhibit No. 1.

Edward J. McCutchen
Warren Olney, Jr.
P. J. Muller
Ira A. Campbell
J. M. Mannon, Jr.
A. Crawford Greene
Charles W. Willard

John F. Cassell
Warren Olney
of Counsel

McCUTCHEN, OLNEY & WILLARD
Attorneys and Counselors at Law
Cable Address "Macpag"
DELIVER
Merchants Exchange Building
San Francisco, California

November 8, 1917.

Nathan Frank, Esq.,
Merchants Exchange Building,
San Francisco, California.

Dear Sir:

If the repairs to the "Bayard" of the injuries resulting from her collision with the steamer "Beaver" are repaired by the Union Iron Works Company on the basis of time and materials at going rates, the owners and underwriters of the "Beaver," if that vessel is ultimately held liable for the collision, will not question the propriety of

that method of repair. This is entirely without prejudice to the question of liability for the collision.

To further eliminate as far as possible controversy over the character of repairs to be made, we suggest that it would be well to permit the surveyors for the owners and underwriters of the "Beaver" to join with the surveyors for the owners and underwriters of the "Bayard" in preparing specifications for the repairs. This also is without prejudice to the question of liability for the collision.

Respectfully yours,
SAN FRANCISCO & PORTLAND STEAMSHIP CO.,

By G. L. BLAIR,
General Manager.

[Endorsed]: United States District Court. No. 16303. Bonheur vs. "Beaver." Lib. Exhibit No. 1. Filed June 17, 1918. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3906. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 7, 1922. F. D. Monckton, Clerk.

Libelant's Exhibit No. 2.

M/S "Bayard" Charter of May 16th, 1917.

VOYAGE CHARTER.

Cost of handling cargo under this charter:

Stevedoring loading	$ 4497.35
" discharging	3726.45
Fuel Oil	2344.46
Dunnage	342.61
Cables & Telegrams	375.14
Clerk hire	139.50
Launch hire	351.45
Pilotage	155.43
Watchmen	71.70
Coal	63.00
Surveys	70.00
Paint	35.00
Water	65.00
Phones	10.10
Clearance & C. H. fees	121.01
Postages	5.00
Tugboat	105.00
Fumigator	2.90
Dockage	95.10
Reporting	5.00
Commission	5616.25
Philippine expenses	3723.19
Cost of operating vessel	21920.70

[Endorsed]: United States District Court. No. 16303. Bonheur vs. "Beaver" Lib. Exhibit No. 2. Filed June 17, 1918. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3906. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 7, 1922. F. D. Monckton, Clerk.

Vessel to work night and day. [illegible]
This charter is subject to [illegible]
Chartering executive of [illegible]

[illegible]

The vessel is to consigned [illegible]

[illegible] fee to [illegible]

To the true and [illegible] performance of all and [illegible] heirs, executors, administrators and assigns, each to [illegible]

[illegible] OF CHARTER

IN WITNESS WHEREOF, we have hereunto set our hands [illegible]

Signed and Sealed in the Presence of

[illegible]

[illegible]

[Endorsed]: (Copy.) Charter Party. Danish Stmr. "Transvaal" to The Robt. Dollar Co., Orient & Return from San Francisco. Dated, 22d March, 1918.

United States District Court. No. 16303. Bonheur vs. "Beaver." Lib. Exhibit "A." Filed Dec. 18, 1918. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 3906. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 7, 1922. F. D. Monckton, Clerk.

Certificate of Clerk U. S. District Court to Original Exhibits.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the accompanying exhibits, known and marked:

Libelant's Exhibit 1—Letter dated Nov. 8, 1917.

Libelant's Exhibit 2—Statement of cost.

Libelant's Exhibit A—Charter Party,

are the original exhibits introduced and filed, in the case entitled: Aktieselskapet Bonheur, a Corporation, Libelant, vs. The American Steamer "Beaver," her tackle, etc., Respondent, No. 16303, and are transmitted herewith in accordance with an order of this Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of August, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk.

[Endorsed]: No. 16303. In the Southern Division of the U. S. District Court, Northern District of California, First Division. Aktieselskapet Bonheur, a Corporation, Libelant, vs. The American Steamer "Beaver," etc., Respondent. Certificate to Original Exhibits.

No. 3906. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 7, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

AKTIESELSKAPET BONHEUR, a Corporation, Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation, Claimant for the American Steamship "BEAVER," Appellee.

Order Extending Time to and Including June 17, 1922, to File Assignment of Errors and Docket Cause.

Good cause appearing therefor, IT IS HEREBY ORDERED that Aktieselskapet Bonheur, a Corporation, appellant herein, have to and including the 17th day of June, 1922, within which to file its assignment of errors herein and to procure to be filed in the above-entitled Court, the apostles on appeal in such cause certified by the Clerk of the United States District Court for the Northern District of California, Southern Division, First Division.

Dated: May 17, 1922.

M. T. DOOLING,
District Judge.

[Endorsed]: No. 3906. In the United States Circuit Court of Appeals. Aktieselskapet Bonheur, a Corporation, Appellant, vs. San Francisco & Portland Steamship Company, a Corporation,

Claimant for the American Steamship "Beaver," Appellee. Order Extending Time to File Apostles on Appeal, etc. Filed May 17, 1922. F. D. Monckton, Clerk. Refiled Aug. 7, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

AKTIESELSKAPET BONHEUR, a Corporation, Appellant,

vs.

American Steamer "BEAVER," Her Tackle, etc., SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation, Appellee.

Stipulation Re Printing Transcript of Record.

IT IS HEREBY STIPULATED that in printing the apostles on appeal herein, the Clerk may omit therefrom the extended title of court and cause in all cases except on the first page and first pleadings in the loer court, and insert in lieu of such caption "Title of Court and Cause."

Dated August 12, 1922.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Libelant and Appellant.

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Claimant and Appellee.

[Endorsed]: No. 3906. In the United States Circuit Court of Appeals for the Ninth Circuit. Aktieselskapet Bonheur, a Corporation, Appellant, vs. American Steamer "Beaver," Her Tackle, etc., San Francisco & Portland Steamship Company, a Corporation, Appellee. Stipulation in the Matter of Printing of Record. Filed Aug. 14, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Form No. 7

San Francisco
Law Library

No.....

Presented by

.....

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.